In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1255

FRANCIS A. VITELLO,
PETITIONER,

v.

CHARLES GAUGHAN,
SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, BRIDGEWATER,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Francis A. Vitello petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on November 8, 1976.

Opinions Below.

The opinion of the court of appeals is reported at 544 F. 2d 17, and appended, *infra*, at p. 1a. The opinion of the United States District Court for the District of Massachusetts (Freedman, J.) is reported at 414 F. Supp. 26, and appended, *infra*, at p. 5a.

Jurisdiction.

The judgment of the court of appeals was entered on November 8, 1976, and is reprinted in the Appendix, *infra*, at p. 4a. The original date for filing this petition, February 7, 1977, was extended by order of Mr. Justice BRENNAN to and including March 9, 1977. The Court's jurisdiction to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Can habeas corpus relief be refused, consistent with 28 U.S.C. §§ 2241 and 2254, to a state prisoner whose conviction is based on wiretap evidence secured in violation of the Fourth Amendment and the corresponding fundamental safeguards established by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et seq.*?[1]

[1]Title III of the Omnibus Crime Control and Safe Streets Act of 1968 will hereinafter be referred to by its codified sections or generally as the "Act" or "Title III."

2. Are federal courts empowered under *Stone* v. *Powell*, ____ U.S. ____, 96 S. Ct. 3037 (1976), or otherwise, to refuse habeas corpus enforcement of the exclusionary rule prescribed by Congress in Title III?

3. Should *Stone* v. *Powell*, ____ U.S. ____, 96 S. Ct. 3037 (1976), be retroactively applied to vacate a final judgment entered by the district court ruling a wiretap order constitutionally defective under the Fourth Amendment where the State raised no objection to the court's deciding the merits of petitioner's claims?

4. Does the rule in *Davis* v. *United States*, 417 U.S. 333 (1974), relating to the assertion of nonconstitutional federal rights in proceedings under 28 U.S.C. § 2255, bar exercise of habeas corpus jurisdiction under 28 U.S.C. §§ 2241 and 2254 in actions brought by state prisoners asserting rights guaranteed by the Fourth Amendment and corresponding safeguards established by Title III?

5. If certain incriminating wiretap evidence would not have been intercepted, but for the wiretap's operation for more days than the state court would or might have authorized had it complied with Fourth Amendment and Title III requirements, is a person convicted on the basis of such evidence "prejudiced" sufficiently by the unlawful wiretap to invoke federal habeas corpus jurisdiction to redress violation of his rights?

6. Can this "prejudice" be cured, consistent with the Fourth Amendment and Title III, by the court of appeals' *post hoc* attempt to fill in the "blank" in the wiretap order where the number of operating days should have been specified by presuming conclusively that the period of operating time applied for by the prosecutor — 15 days, the statutory maximum — would have been found "necessary" and granted by the state court?

Constitutional and Statutory Provisions Involved.

The text of the Fourth Amendment and pertinent sections of Title III, of 28 U.S.C. §§ 2241 and 2254, and of M.G.L. c. 272, § 99, are reprinted in the Appendix, *infra*, at pp. 10a-16a.

Statement of the Case.

As a result of certain evidence obtained during the operation of a wiretap installed under a state court order dated May 10, 1972, Francis A. Vitello was indicted and, in April, 1973, convicted for violations of various Massachusetts gaming laws. Prior to trial and thereafter on appeal to the Supreme Judicial Court, petitioner sought to have the wiretap evidence suppressed because nowhere in the wiretap order or otherwise did the state court specify any time period or limits and termination date on the tap's operation. Suppression was denied by both courts, and, having exhausted state remedies, petitioner invoked federal habeas jurisdiction under 28 U.S.C. §§ 2241 and 2254 to vindicate his rights.

A. The Statutory Framework.

The statutory structure governing state wiretap orders, and particularly the interplay of federal and state law, should be described at the outset. State wiretapping is precluded by Title III, unless specifically authorized by

separate state legislation. See 18 U.S.C. § 2516(2).[2] State legislation may impose limits on wiretapping which are more restrictive than those prescribed by Title III.[3] Where this occurs, Title III operates to incorporate the more restrictive standards by expressly denying the state court power to issue a wiretap order unless the court has acted and its order is in conformity not only with all federal requirements, but also "with the applicable State statute. . . ." 18 U.S.C. § 2516(2). This scheme is enforced by the suppression rule set forth in § 2515 of the Act.

This statutory framework has important bearing in the present case because the number of days a wiretap may be authorized to operate under Title III has been substantially reduced by Massachusetts legislation. Title III restrains courts from authorizing a wiretap to operate "for any period longer than is necessary," and sets the maximum number of operating days a court may authorize at 30. 18 U.S.C. § 2518(5). The legislative history of Title III reveals that it was in response to "a command of the Constitution" that Congress barred courts from authorizing wiretaps to operate "longer than is necessary" and required this determination of "necessity" to be made according to the particular nature and facts of each case.[4] After making this determination of the necessary operating days, Title III

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[1]See also S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), 1968 U.S. Code Cong. & Adm. News (hereinafter "S. Rep. No. 1097"), p. 2187.

Some states have chosen not to enact wiretap legislation, and consequently their agents are precluded from employing wiretaps in their investigations. See *Halpin* v. *Superior Court*, 101 Cal. Rptr. 375, 495 P. 2d 1295 (Cal. S. Ct. 1972), cert. den. sub nom. *California* v. *Halpin*, 409 U.S. 982 (1972).

[3]See S. Rep. No. 1097, p. 2187. Of course, the state may not undercut Title III by enacting standards which are less restrictive than those prescribed by Congress. *Ibid.*

[4]S. Rep. No. 1097, p. 2190.

directs the court to specify that period of time in the wiretap order. 18 U.S.C. § 2518(4).[5]

In regard to this critical decision of the number of operating days to authorize in a given case, Massachusetts legislation is markedly more restrictive than Title III. Under M.G.L. c. 272, § 99I, the state court must restrict the number of operating days to a period not longer than is "necessary," as Title III requires, but in no event may the court grant more than 15 days. The court is also directed under § 99I to bracket the time period during which the order must be executed, by setting the dates when interception must commence, and a date up to 30 days later when it must cease.[6] Like Title III, the Massachusetts law requires the state court to specify in the wiretap order both the operating time limit and the period of possible surveillance.

The wiretap order in this case contained no such specification of the number of operating days authorized, or the period when these operating days could be used.[7] Nor does the record indicate that the state court even considered the

[5]In addition, subsection (5) of § 2518 requires every order to contain the following directions:

> "that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days."

[6]For example, presumably when an extreme case of necessity is shown, a court may authorize the maximum operating time, in a maximum period, *i.e.*, the wiretap may be operated on 15 days during a specified 30-day period. Of course, since these are the maximum periods, it is assumed that both the operating time and the time field of operation would be shorter in the normal case.

[7]In fact it did not contain any of the time limits required by Title III and Massachusetts law. A copy of the order is annexed at p. 17a.

question of how many operating days were necessary and therefore could be authorized. What the state court decided on this question, if anything, is completely unknown. Petitioner maintains that had the state court made and specified this decision in compliance with the requirements of Title III and the state law it incorporates, the wiretap would not have been authorized to operate for the number of days it did and might or would have been shut down before his incriminating conversations were intercepted.

B. The May 10, 1972, Wiretap Application.

Application for the wiretap order involved here was made on May 10, 1972, in the Superior Court for Suffolk County by a specially designated assistant district attorney. The application reported that a prior wiretap order had been applied for and granted by the court on April 24, 1972, in connection with the same gaming investigation. Apparently, the wiretap installed under the April 24 order was operated for eight days and intercepted over 300 conversations, many of which concerned gaming violations. Even though the April 24 wiretap was directed against petitioner, none of the intercepted conversations implicated him in criminal activities. Despite this, the May 10 application sought permission to operate the new wiretap against petitioner, as well as the other individuals targeted for the earlier tap. Like the earlier wiretap, the tap for which the May 10 application sought authorization was to be installed on telephones located in a private residence.

The May 10 application requested that the court authorize wiretapping for a period of 15 days, "commencing on the date of installation. . . ." The application contains the assertion that 15 days are "required," but

nowhere does it or the accompanying police affidavit attempt to substantiate this contention.

C. The May 10 Wiretap Order.

Along with the application and police affidavit, the prosecutor prepared and filed a proposed wiretap order on May 10, 1972. At the time it was filed, the proposed order was completely "blank" as to time limits. Most importantly, it did not specify and set any time limit on the number of days the wiretap could operate. Nor did it contain specifications of the dates on which the wiretapping must begin and terminate. None of these "blanks" were filled in by the state court when it reviewed and signed the order later in the day on May 10, 1972. Nothing in the record exists to suggest that the court considered the time limits question or what, if anything, it decided in this regard.

Apparently the wiretap authorized by the May 10 order was operated on at least 12 days, for approximately eight hours a day. Some 2,058 conversations were intercepted, of which only 13 concerned or involved petitioner. A few of those 13 were incriminating and became the principal subject of a suppression motion filed pursuant to 18 U.S.C. § 2518(10)(a).

D. The Suppression Motion.

Under Title III, a defendant "may move [before trial] to suppress" wiretap evidence procured on the basis of a wiretap order "insufficient on its face." 18 U.S.C. § 2518(10)(a)(ii). Pursuant to this provision, petitioner moved to suppress the wiretap evidence secured under the May 10, 1972, order, on the grounds, among others, that the interceptions were unlawful and the order was insufficient on its face because the number of days the tap could be operated had not been set or specified by the court, and because, in fact, the order contained no time limits. During oral argument in opposition to the motion, the prosecution asserted that the absence of these required time limits in the order was the result of a proofreading failure by the assistant district attorney who drafted the proposed order, who "missed the fact that that had been left out" before it was submitted to the court.[8] But the prosecution offered no evidence to suggest the court considered how many operating days were "necessary" to the investigation, and, if it did make such a determination, how many operating days it decided were "necessary." Nor did the prosecution offer any explanation for the court's failure to insert the required time limits specifying the number of operating days and the dates on which the wiretapping must commence and on which it must cease. Apparently, the prosecutor viewed the state court as a rubber stamp, for he seems never to have read the order after it issued to ascertain what operating and other time limits had been set by the court. If, on the other hand, he had read the order for the time limits and found none, the prosecutor certainly owed the court and defense an explanation for not immediately calling the order's defects to the court's attention. No such explanation was offered in response to the suppression motion.

The trial court denied petitioner's suppression motion. Despite the fact that Title III and Massachusetts law flatly require the court to decide and specify in the order the number of operating days, the trial court excused the violation on the grounds that it was caused by the prosecutor's

[8] Transcript of proceedings on December 18-19, 1972, p. 150.

inadvertent failure to have "the lines in the [proposed] warrant relating to the [proposed] time limitations . . . typed in . . ." before submission to the issuing court.[9] Regarding the validity of the order, however, the trial court concluded that it lacked the power to "review, in what is an appellate fashion, the action of another judge of the Court."[9a]

E. The Direct Appeal.

On direct appeal the Supreme Judicial Court sustained the May 10 wiretap order.[10] The court appears to have focused exclusively on the failure of the order to specify a "termination date." No mention is made in the Supreme Judicial Court's opinion of the order's chief defect, the failure to specify the number of days on which the wiretap could be operated and the issuing judge's evident failure to make a determination of the operating time period on the basis of "necessity." With regard to the absence of a termination date, the court concluded that this time limit could be supplied by deeming the application's requested termination date (15 days after installation of the tap) to be incorporated in the issued order. The court did not consider it an impediment to such incorporation that the May 10 order neither expressly nor by implication refers to the 15-day request made in the application.

[9]Transcript of proceedings on January 22, 1973, p. 212.

[9a]*Id.* at 213.

[10]The Supreme Judicial Court's opinion is reported at 327 N.E. 2d 819.

F. Petitioner's Resort to Federal Habeas Corpus.

Federal habeas corpus relief was thereafter sought on the grounds that the May 10 order was essentially a general and blank warrant because it specified no time limits. The Commonwealth raised no objection to the power or propriety of the district court's exercising habeas jurisdiction to review petitioner's claim. Rather, the Commonwealth confined itself to the merits, contending that the May 10 order should be read to incorporate the applications' time limits. On April 9, 1976, the district court ruled the May 10 order "constitutionally defective." The court concluded that there was no case or constitutional authority for incorporation where, as here, the applications' time limits are not adopted by reference in or physical attachment to the order.

The First Circuit reversed. Withholding judgment on the merits, the court below sustained the Commonwealth's objections to federal habeas corpus review of petitioner's claim, objections not raised in the district court. The court reasoned that while the absence of time limit specifications in the wiretap order simultaneously violate Fourth Amendment and Title III safeguards, habeas corpus relief was available for neither. A Fourth Amendment attack on the absence of time limits was precluded, according to the court, by this Court's intervening decision in *Stone* v. *Powell*, ____ U.S. ____, 96 S. Ct. 3037 (1976). Likewise, reliance on Title III was futile, for despite the fact that absence of time limits is a Fourth Amendment violation, the claim is downgraded to "nonconstitutional error" when the Title III suppression remedy is invoked. Such "errors," in the court's estimation, fell within the compass of the rule in *Davis* v. *United States*, 417 U.S. 333 (1974), and could be redressed in federal habeas corpus proceedings only if suf-

ficient "prejudice" has been suffered. The court concluded that petitioner was not "prejudiced" sufficiently by the order's defect, characterized as a "fail[ure] to contain the 30-day limit required by" 18 U.S.C. § 2518(5) since there was no claim the tap operated beyond that time limit.

Reasons for Granting the Writ.

Of all investigatory techniques, wiretapping poses the greatest threat to constitutional rights of personal privacy.[11] The most dangerous feature of this "awesome power," *United States* v. *Giordano*, 469 F. 2d 522, 528 (4th Cir. 1972), affirmed, 416 U.S. 505 (1974); *United States* v. *Robinson*, 468 F. 2d 189, 192 (5th Cir. 1972), is the fact that a wiretap operates as an "electronic dragnet," indiscriminately subjecting all conversations to surveillance regardless of their relevance to legitimate objectives of a particular investigation.[12] This knowledge of the special dangers of wiretapping was the force that compelled Congress to enact stringent standards and a maximum suppression sanction in Title III for the purpose of "limiting use of the intercept procedure to 'the most precise and discriminate circumstances'." *United States* v. *Donovan*, ___ U.S. ___, 97 S. Ct. 658, 673 n. 25 (1976).[13]

[11]See *Berger* v. *New York*, 388 U.S. 41, 64 (1967); *United States* v. *King*, 478 F. 2d 494, 503 (9th Cir. 1973); 114 Cong. Rec. 11598-11599, 14700.

[12]See 114 Cong. Rec. 11599, 14713.

[13]Congress' intent primarily was to discourage and limit police use of "this extraordinary investigative device," *United States* v. *Giordano*, 416 U.S. 505, 527 (1974), except in very clearly specified and controlled instances. See *United States* v. *Capra*, 501 F. 2d 267, 276 (2d Cir. 1974); *United States* v. *Marion*, 535 F. 2d 697, 706 (2d Cir. 1976); *United States* v. *King*, *supra*, at 503; S. Rep. No. 1097, pp. 2185, 2191.

Based on findings of widespread illegal wiretapping, especially prevalent at state and local levels where controls were few and lacking uniformity,[14] and guided by this Court's application of Fourth Amendment standards to wiretapping in *Berger* v. *New York*, 388 U.S. 41 (1967), and *Katz* v. *United States*, 389 U.S. 347 (1967),[15] Congress moved decisively in 1968 by enacting Title III to establish meaningful safeguards and remedies for the constitutional rights of those subjected to wiretapping and other forms of electronic surveillance.

Congress designed Title III to serve primarily a preventive rather than remedial role in protecting constitutional rights of privacy. See *United States* v. *Giordano*, 416 U.S. 505, 523, and n. 12 (1974).[16] Title III achieves this end by clearly delineating the *Berger-Katz* requirements, § 2518, by proscribing wiretaps conducted without prior court authorization, §§ 2511, 2518, by enjoining courts from authorizing any wiretap to operate for longer than is "necessary" and in no event for longer than 30 days (or a lesser period set by state statute), § 2518(5), and by directing courts to specify the time and other particularized limits in the wiretap order, § 2518(4). Obedience to these requirements is compelled mainly through

[14]See Statement of Congressional Findings, Pub. L. 90-351, § 801. See Hearings before the Subcommittee on Criminal Laws and Procedures, Sen. Judiciary Committee, 90th Cong., 1st Sess. (1967), p. 75; 114 Cong. Rec. 14713.

[15]See *United States* v. *Donovan*, *supra*, at 668; S. Rep. No. 1097, p. 2153; as Senator McClellan, the principal author and proponent of Title III, stated: "every safeguard, in keeping with what the Supreme Court has said in the most recent cases, would be required [by the Act]. Every constitutional safeguard has been placed in the bill." 114 Cong. Rec. 14469, 14728; see also 114 Cong. Rec. at 14470, 14717.

[16]The basic intent of Congress was to prevent unlawful wiretapping through explicit substantive regulations and the deterrent effect of a strictly applied suppression rule. S. Rep. No. 1097, p. 89.

the deterrent effect generated by the suppression rule contained in § 2515 and effectuated by § 2518(10)(a).[17]

The decision below substantially undermines Congress' effort to prevent unconstitutional and excessive wiretapping, particularly by state authorities, by eliminating a vital measure of federal habeas power to enforce the suppression rule Title III prescribes as the chief deterrent against wiretap abuses. This decision stands in conflict with the Fourth Amendment standards the Court declared in *Berger* and *Katz*, with the maximum deterrent effect against violation of these standards Congress intended to achieve by Title III's suppression rule, with the habeas corpus jurisdiction Congress has extended for redress of constitutional and federal law violations by state officials, and with the decisions of the Second, Third and District of Columbia Circuits. Because of its important consequences, its conflict with the rulings of other Circuits, and its dubious support, the decision below should be reviewed by this Court.

I. The Decision Below Conflicts with the Mandate of Congress and this Court that Federal Courts have and Must Exercise Habeas Corpus Jurisdiction to Suppress Wiretap Evidence Seized in Violation of the Fourth Amendment Pursuant to the Suppression Rule Congress Enacted in Title III.

A. *In Specifying No Time Limits, the May 10 Order Constitutes a "General Warrant" Facially Void under the Fourth Amendment.*

In *Berger* v. *New York*, *supra*, this Court condemned a wiretap order authorizing 60 days of interception as a

[17] See S. Rep. No. 1097, pp. 2185, 2195.

virtual "general warrant" and void on its face under the Fourth Amendment. In *Katz* v. *United States*, *supra*, this Court ruled that the Fourth Amendment warrant requirements apply to wiretaps "afford[ing] similar protections" for the privacy of those exposed to electronic surveillance as have been afforded in traditional search and seizure settings. 389 U.S. at 355, quoting from *Berger* v. *New York*, *supra*, 388 U.S. at 57. In both cases the constitutional violations were found without regard to whether the subject of surveillance had actually been prejudiced by the actions that rendered the wiretap procedure invalid. Suppression was ordered in *Berger* because of the 60-day authorization, even though incriminating evidence was secured within 14 days. 388 U.S. at 45. In *Katz*, the Court conceded that the wiretap procedure followed by the FBI was entirely constitutional except for the failure to incorporate the agent's self-imposed restraints in a warrant. Failure to obtain a warrant was, the Court ruled, "*per se* unreasonable under the Fourth Amendment," and the evidence procured by the wiretap must be suppressed. 389 U.S. at 357.

Together, *Berger* and *Katz* create a warrant system geared to the special character and dangers of wiretapping. Two requirements of that system have particular importance in this case: first, time limits on the operation of the wiretap must be set and specified in the warrant or order; and second, these limits must restrict the wiretap so that it affects "no greater invasion of privacy . . . than [is] necessary under the circumstances." *Katz* v. *United States*, *supra*, at 355, quoting from *Berger* v. *New York*, *supra*, at 57.

Measured by these *Berger-Katz* requirements, the wiretap order in this case amounts to a massive violation of the Fourth Amendment. The order sets and specifies no date

or instructions for early installation and initiation of wiretap interception. It provides no termination date. Most importantly, it sets and specifies no limit on the amount of time the tap can operate. Indeed, the only reference in the order to time limits on the tap's operation is that it

> "shall not automatically terminate when the type of communication described in the Application and Affidavit has been first obtained, but shall continue until communications are intercepted which reveal the details of said violation . . ." (p. 19a).

And neither the order nor record in any part suggests that the state court even considered the question of how much operating time was "necessary" in this case. The order, in short, is "blank" as to time limits, relegating both the police who must execute it and the courts who must validate the evidence seized under it to the position of having to speculate as to what if any time limits the issuing court actually imposed.

The facial invalidity of the May 10 order is conceded by respondent. But the Commonwealth contends that the order can be resurrected by reading into it the operating time and termination date requested in the May 10 application. That approach simply cannot be reconciled with the terms or purposes of the Fourth Amendment warrant requirement.

The Fourth Amendment, as this Court ruled in *Berger* and *Katz*, requires all particularizations limiting the scope and duration of the wiretap invasion of privacy to be set on the basis of "necessity" and specified in the "warrant." Neither the text of the Amendment nor the Court's opinions suggest exceptions to this rule; certainly there is no sug-

gestion that the various requests and conclusions stated by the prosecution in its application and affidavit can be deemed or presumed to be the court's findings and warrant specifications.

Acceptance of the Commonwealth's position would render the warrant requirement a nullity. A warrant is not a mere formality. Its role is central in the Fourth Amendment scheme, since it serves as the full and final word on when and how a search can be conducted. As the single definitive source of authority, the warrant can be relied on by the police to guide their actions, eliminating guesswork and discretion; it can command respect from those whose privacy is being invaded, representing in writing the detached and deliberative judgment of a magistrate; and it can provide the authoritative response to any claim that evidence was seized unlawfully. See *Katz* v. *United States*, *supra*, at 357-359.

Respondent's position that the warrant should not be treated as the full and final word by which the legality of the search is to be tested leads in two opposite and equally destructive directions. In one direction the position opens the way to a reign of speculation and doubt as each side marshals extrinsic evidence to supplement or dispute what the issuing court specified in the warrant. The other direction is toward a rule, which appears to have been accepted by the Supreme Judicial Court in this case, that the issuing court is conclusively presumed to have granted whatever operating time the police want. Its premise must be that the issuing court is a "rubber stamp." Such a presumption is plainly unacceptable. Since the court's duty is to limit the operating time to no longer than is necessary, it can hardly be assumed that it would or did find that a police request, here for the maximum time, is presumptively

confined to what is necessary.[18] Following either course undermines the integrity of the warrant and the "procedure of antecedent justification . . . that is central to the Fourth Amendment," *Osborn* v. *United States*, 385 U.S. 323, 330 (1966), and installs the rule of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." See *Katz* v. *United States*, *supra*, at 358-359, quoting from *Beck* v. *Ohio*, 379 U.S. 89, 96, 97 (1964).[19]

Moreover, as the district court found, respondent's position that the application's time limits are incorporated by the May 10 order finds no case support. No decision authorizes supplementation of the warrant from an application or affidavit except in circumstances where those documents are expressly incorporated by reference in or by physical attachment to the warrant.[20]

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[18]To assume the police request regarding operating time is limited to what is "necessary" is contrary to the reasons prior clearance and warrants are required in the first place. It is in response to the reality that police officials pursuing their quarry cannot be relied on to take a neutral, deliberative stance regarding the needs of their investigation that the Fourth Amendment has been consistently read to require "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police. . . ." *Wong Sun* v. *United States*, 371 U.S. 471, 481-482 (1963).

[19]Another consequence of following either course, one well illustrated in this case, is that there will be strong incentives for the prosecutor and police to treat the court as a rubber stamp. That must have been the attitude of the prosecutor in this case, since he evidently did not even bother to read the order after it was signed to ascertain what limits the court had imposed on the wiretap. Of course, if the prosecutor had read the order, he certainly was obligated to advise the court immediately of its insufficiency.

[20]See *Moore* v. *United States*, 461 F. 2d 1236 (D.C. Cir. 1972). That case exemplifies the type of case where the problem of incorporation generally arises; see, *e.g.*, *Commonwealth* v. *Todisco*, 294 N.E. 2d 860 (Mass. S.J.C. 1973). Instead of referring to the target premises described in the underlying affidavit, the warrant in such cases attempts to summarize the description, but fails fully to repeat every significant detail. Where this has happened courts have allowed reference to the affidavit, if it is expressly incorporated or physically attached to the warrant when issued. But another basis for incorporation is that the particular aspect of the warrant involved in these cases is only meant to be a summary of the affidavit, not a statement of "any judicial determination" regarding the scope of the search. *Moore* v. *United States*, *supra*, at 1238. The test for a warrant's sufficiency as to the identity of the premises to be searched is whether "the officer with a search warrant can, with reasonable effort ascertain and identify the place intended." *Steele* v. *United States*, 267 U.S. 498, 503 (1924). Since the portion of the warrant involved is merely descriptive and not judgmental, it is reasonable for the officer who executed the affidavit and will execute the search to consult the affidavit to flesh out the court's summary. Moreover, it is fair for the officer to assume that the court means the place the officer has described in the affidavit since the court has no independent knowledge of the premises and is not likely to approve a search broader in scope than the police seek to undertake.

But, in this case the question is limits on the amount of time a wiretap may operate, not the address or number of the telephone. Setting time limits requires the court to make an independent judgment of how much time is necessary under the circumstances. It is clear that this judgment also requires the court to apply its experience and instincts as a neutral decisionmaker to strike the proper balance between investigatory and privacy interests. Certainly the police cannot look at a warrant that specifies no time limits and reasonably assume that the court necessarily approved the limits requested in the application, especially where the operating time sought by the prosecutor is the maximum amount possible.

B. *The Court Below Erred in Holding that Stone v. Powell, ____ U.S. ____, Precludes Federal Courts from Exercising Habeas Jurisdiction to Enforce the Suppression Remedy Congress Enacted in Title III to Redress Wiretap Violations of the Fourth Amendment.*

Stone v. *Powell*, *supra*, is concerned exclusively with a "judicially created" suppression rule. See 96 S. Ct. at 3046. *Stone* holds that the Fourth Amendment does not require the suppression remedy or its enforcement by federal

habeas corpus. As such the existence of the remedy and the degree of its enforcement are matters of judicial policy. "[W]eighing the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims," the Court concluded that the additional deterrent effect generated was too small to justify the costs of more exacting enforcement of the Constitution. 96 S. Ct. 3049, 3051.

The Title III suppression rule was created by Congress, not the courts. A short and full response to the decision below is that *Stone* does not and, indeed, could not reverse the policy judgment of Congress. *United States* v. *Giordano*, 416 U.S. 505, 524 (1974). Whether the courts deem habeas enforcement of the Title III suppression rule good or bad policy, the matter is entirely for Congress to decide. Congress' unalterable decision was to harness the vital power of federal habeas corpus to the Title III suppression rule.

Nothing in the language, history or purposes of Title III suggests the contrary. Title III neither contains nor implies any limit on the availability of federal habeas jurisdiction to enforce the statutory suppression remedy. If this had been its intention, Congress surely could and, it must be presumed, would have said so. See *United States* v. *Kahn*, 415 U.S. 143, 153 (1974).[11]

[11] In fact, several proposed versions of Title II of the Omnibus Crime Control and Safe Streets Act incorporated sections limiting either or both the exclusionary rule and federal habeas jurisdiction to enforce it. See, *e.g.*, 114 Cong. Rec. 11189. Congress enacted certain regulatory measures relating to the judicial exclusionary rule regarding confessions and eye-witness identification. See 18 U.S.C. §§ 3501-3503. It enacted no similar restriction on the Title III exclusionary rule and no restriction on the availability of federal habeas corpus jurisdiction to enforce the Title III or any other suppression rule. Thus, Congress was not without words to express an intention to establish such restrictions. Moreover, in accord with the governing canon of statutory construction requiring "clear and convincing evidence," of a Congressional intention to impose such restrictions, Title III should not be construed "to restrict access to judicial review." *Johnson* v. *Robinson*, 415 U.S. 361, 373-374 (1974).

Nor does the history of Title III indicate such an intention. What does appear, however, is that Congress was acutely aware of the distinctive threat wiretapping posed to the right of privacy. *United States* v. *Kalustian*, 529 F. 2d 585, 588 (9th Cir. 1975). The suppression rule embodied in § 2515 was cited continuously throughout the legislative hearings and debates by proponents of Title III as the primary assurance that the safeguards of privacy established by the Act would be scrupulously obeyed. See *Gelbard* v. *United States*, 408 U.S. 41, 46-51 (1972); S. Rep. No. 1097, p. 2185. In S. Rep. No. 1097, the key legislative report, it was affirmed that there was no intention "to press the scope of the suppression rule beyond present search and seizure law. See *Walder* v. *United States*." The *Walder* citation plainly reveals Congress' meaning. It makes evident Congress' intention that Title III's suppression rule not afford the defendant "a shield against contradiction," see *Walder* v. *United States*, 347 U.S. 62, 65 (1954). But it is equally clear that Congress intended that its suppression rule would ensure, as it perceived the judicial rule did, that "the Government cannot make an affirmative use of evidence unlawfully obtained." *Walder* v. *United States*, *supra*. In serving this role, Congress meant to have its suppression rule enforced by the same measure of judicial power and resources as the judicial suppression rule was receiving under then "present search and seizure law." Under the then "present" law, it was firmly established that federal habeas corpus remedies were available to vindicate the Fourth Amendment rights of state defendants. See *Carafas* v. *LaVallee*, 391 U.S. 234 (1968); *Warden* v. *Hayden*, 387 U.S. 294 (1967); see also *Kaufman* v. *United States*, 394 U.S. 217, 225 (1969). Enforcement of Fourth Amendment rights by federal habeas corpus remedies was the "present" search and seizure law Congress incorporated

as a component of the suppression rule it created. The maximum deterrent effect such remedies afford was plainly intended by Congress for its suppression rule, which was "designed to protect privacy . . . [and] serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications." S. Rep. No. 1097, p. 2185.

Congress' purpose in creating the Title III suppression rule was to compel strict adherence to the safeguards prescribed by the Act, see *United States* v. *Giordano*, *supra*, by removing any and every incentive to violate them. Congress intended that the Title III suppression rule would exert its deterrent force to the maximum degree. In *Stone* v. *Powell*, *supra*, this Court cited the fact that the judicial suppression rule applies only in criminal trial settings as telling evidence that the rule was never conceived of as achieving its maximum deterrence potential. But that same type of evidence in regard to the breadth of the Title III suppression rule demonstrates, in contrast to the judicial rule, that the purpose of Congress was to generate a deterrent effect at the maximum level. Thus, while the judicial rule was confined to the criminal trial, Congress' rule extends to all phases of the criminal proceeding from the grand jury to sentencing, and to the correctional process as well, including parole and probation proceedings. While standing to invoke the judicial rule is quite narrow, standing under Title III to suppress extends to any "person aggrieved," including "a person against whom the interception was directed." 18 U.S.C. § 2510. The judicial rule applies only to criminal proceedings; the suppression rule in Title III applies "across the board," to criminal, civil, administrative and legislative proceedings. S. Rep. No. 1097, p. 2185. Also compare *United States* v. *Calandra*, 414 U.S. 338 (1974), to *Gelbard* v. *United States*, 408 U.S.

41 (1972). Finally, by contrast to the judicial rule, see *Stone* v. *Powell*, *supra*, one express purpose of the Title III suppression rule is to "protect the integrity of court and administrative proceedings."[22] See *Gelbard* v. *United States*, *supra*, at 66, compare *United States* v. *Calandra*, *supra*, at 347-348.

Congress was fully aware of the costs of such a suppression rule, but it was equally aware of the special threats to privacy posed by wiretapping and it was determined to prevent their realization by guaranteeing maximum enforcement of Title III's suppression rule. See *Gelbard* v. *United States*, *supra*, at 46-51.

C. *The Court Below Erred in Applying Davis v. United States, supra, to Proceedings Instituted by State Prisoners under 28 U.S.C. §§ 2241 and 2254 to Redress Violations of their Constitutional Rights.*

Contrary to the decision below, *Davis* v. *United States*, *supra*, does not apply to this case. *Davis* is strictly limited to nonconstitutional claims.[23] In this case petitioner asserts fundamental rights guaranteed by the Fourth Amendment. Whatever limits *Davis* may impose in federal habeas corpus cases, they are confined to nonconstitutional errors of law,

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[22] Statement of Congressional Findings, Pub. L. 90-351, § 801(b).

[23] *Davis* carries forward a distinction between constitutional and nonconstitutional claims which this Court has consistently followed in determining the availability of relief under 28 U.S.C. § 2255. See *Kaufman* v. *United States*, 394 U.S. 217, 223 (1969); *Sunal* v. *Large*, 332 U.S. 174, 179 (1947).

and therefore present no barrier to review of petitioner's Fourth Amendment claims on their merits.[24]

II. Assuming Arguendo that Petitioner's Claims of Right can be Relegated to the Status of "Nonconstitutional Errors," the Court Below Incorrectly Ruled that Davis v. United States Constricts the Power of Federal Courts to Review such Claims under the Jurisdiction Conferred by 28 U.S.C. § 2254.

In 28 U.S.C. § 2254(a) Congress expressly conferred jurisdiction on federal courts to grant a writ of habeas corpus to persons in custody under state court judgments in violation

[24] While petitioner invokes a statutory remedy to vindicate his Fourth Amendment rights, this is no basis for downgrading the substantive right he asserts from one guaranteed by the Constitution to one protected only by statute. In *Davis*, the focus was on the substantive claim and its source in the Constitution or statute. Whatever limit *Davis* imposes in § 2255 proceedings was confined solely to nonconstitutional substantive claims. To hold that invocation of Title III remedies for Fourth Amendment violations has the effect of downgrading the claim of right to nonconstitutional status would mean that *Davis* limits must apply in every case. For if the invocation of a statutory remedy triggers the downgrading of constitutional rights, it follows that such downgrading will occur merely on the request for the statutory remedies provided by 28 U.S.C. § 2255.

While a wiretap order without time limits simultaneously violates Title III, 18 U.S.C. § 2518(4) and (5), and the Fourth Amendment, the character of the right violated is not reduced to "nonconstitutional error" merely because the Fourth Amendment right is repeated in a statutory text. Indeed, Congress acted under the explicit grant of constitutional power under § 5 of the Fourteenth Amendment, see S. Rep. No. 1097, p. 2180, to implement Fourth Amendment restrictions on state use of wiretaps. Cf. *California* v. *LaRue*, 409 U.S. 109 (1972). Nor is there any evidence in the legislative history of Title III suggesting that Congress, in restating the *Berger-Katz* standards in statutory text, meant to demote their status and qualify their enforcement through federal habeas corpus actions.

of the "laws" as well as the Constitution of the United States. That provision, "express[ing] the choice of Congress how the superior authority of federal law should be asserted," imposes a power and duty on federal courts to "review errors of federal law in state determinations." See *Brown* v. *Allen*, 344 U.S. 443, 508-510 (1953) (opinion of Mr. Justice Frankfurter). In short, § 2254 invests state prisoners with a right to have their federal claims of right, predicated on the Constitution or federal statute, reviewed by a federal court. Congress has essentially made the federal courts "the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." *Zwickler* v. *Koota*, 389 U.S. 241, 247 (1967); see also *Kaufman* v. *United States*, 394 U.S. 217 (1969).

There is nothing in the text or history of § 2254 that says or implies that the federal courts may pick and choose between federal "law" (as opposed to constitutional) claims as to which deserve vindication and which do not based on some standard of "prejudice." Quite appropriate to this case, confronting the *Davis* incursion on § 2254, is Mr. Justice Frankfurter's injunction, issued in a closely analogous § 2254 context:

> "Under the guise of fashioning a procedural rule, we are not justified in wiping out the practical efficacy of a jurisdiction conferred by Congress. . . . Rules which in effect treat all these cases indiscriminately as frivolous do not fall far short of abolishing this head of jurisdiction." *Brown* v. *Allen*, *supra*, at 498-499.

Nor does the *Davis* opinion suggest its application to § 2254. *Davis*, of course, concerned only proceedings for

collateral review under 28 U.S.C. § 2255 of federal court judgments. While § 2254 and § 2255 serve analogous roles, they are fundamentally distinct in one important respect. In a § 2255 proceeding, the petitioner has already had the advantages of a federal trial and generally a federal appellate forum. In § 2254 cases the petitioner has not. Since a central purpose of federal habeas corpus is to provide a meaningful opportunity for review of federal rights in a federal forum,[25] it may be reasonable to raise the threshold to such a forum where the federal claims have already been litigated once before in federal courts. Cf. *Fay* v. *Noia*, 372 U.S. 391, 424 (1963); *Sunal* v. *Large*, 322 U.S. 174, 178 (1947); and see Bator et al., *Hart and Wechsler's The Federal Courts and The Federal System* (1977 Supp.), p. 268. These considerations obviously have no application to a § 2254 proceeding, where, as here, the right to federal review is invoked for the first time.[26]

[25] See *Kaufman* v. *United States*, 394 U.S. 217, 225-226 (1969); *Brown* v. *Allen*, 344 U.S. 443, 508-509 (1953) (opinion of Mr. Justice Frankfurter); *Desist* v. *United States*, 394 U.S. 244, 262-263 (1969) (Mr. Justice Harlan dissenting); *Developments — Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1040 (1970).

[26] In 28 U.S.C. § 2254, Congress has provided for review of constitutional and federal law claims as a matter of right. Nothing in § 2254 or its history suggests any qualification of that right.

While review is available in this Court on a writ of certiorari following direct appeal to the highest state court, that review is exceedingly discretionary. Moreover, it has been frequently recognized that practical limitations make it impossible for this Court to bear the burden of being the first and last federal forum to oversee the enforcement of constitutional and other federal rights in state cases. See, *e.g.*, *Developments — Federal Habeas Corpus*, *supra*, at 1061. Among the points that appear to have been decisive in Congress' judgment not to cut back federal habeas corpus jurisdiction was the conclusion that placing such a burden on this Court would greatly decrease the controlling and unifying force of federal court review of state court enforcement of federal rights. See 114 Cong. Rec. 11747. Federal habeas courts were aptly described during the Congressional debate over Title II of the Act as "sitting as delegates or masters for the Supreme Court." 114 Cong. Rec. 12834.

To the extent that *Davis* acts as a gatekeeper for relitigation of federal claims that had or could have been considered by a federal court, it reflects very practical concerns that the "writ of *habeas corpus* not be allowed to do service for an appeal." Because of the myriad federal statutory rights that apply in federal criminal cases, it is necessary to cull out those relatively few occasions where Congress could reasonably have intended to provide a right of litigation. By contrast, the occasion when a federal statutory right will affect the course of a state criminal case will be exceedingly rare.[27] It is fair to assume that only the most compelling federal interests would give rise to the enactment by Congress of statutory controls on state criminal cases. Title III is a good example of the type of interests and fundamental Congressional power that would be involved. It follows that, with so great a federal stake in such laws and their proper enforcement, Congress would intend their necessary and unqualified inclusion under § 2254 to ensure effective federal court supervision. Again Title III is in point, since it was enacted not only to protect the fundamental right of privacy, but also to provide a uniform and unifying codification of wiretap safeguards to take the place of disparate or nonexisting state regulations. See S. Rep. No. 1097, pp. 2153, 2156.[28] Plainly, Congress intended that such legislation would have the responsive and unifying

[27] Comment, 88 Harv. L. Rev. 213, 218 (1974). Bator, Shapiro, Miskin & Wechsler, *Hart and Wechsler's The Federal Courts and The Federal System* (1977 Supp.), p. 267. The most common example of federal habeas review of nonconstitutional claims by state prisoners has been in the enforcement of federal extradition rights. See, *e.g.*, 18 U.S.C. § 3182.

[28] See also Statement of Congressional Findings, *supra*, Pub. L. 90-351, § 801(a).

enforcement that only an unqualified right to habeas review in the federal courts can assure. See generally, *Developments — Federal Habeas Corpus, supra.*

III. Assuming Arguendo that Davis v. United States Extends to Cases Brought under 28 U.S.C. § 2254, the Court Below Misapplied Davis to Bar Review of the Fourth Amendment and Title III Claims Asserted in this Case.

A. *Davis does Not Apply to a Case Involving Title III Claims.*

Because of the preemptive character of Title III, because of the important purposes served by its uniform code of safeguards and its suppression remedy, and especially because Congress has mandated strict enforcement of the Act, there exist in cases raising Title III claims "exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Bowen* v. *Johnston*, 306 U.S. 19, 27 (1939). In refusing to find such "exceptional circumstances" here, the decision below is in direct conflict with the decisions of the Third Circuit in *United States* v. *Iannelli*, 528 F. 2d 1290 (1976); District of Columbia Circuit in *United States* v. *Vecchiarello*, 536 F. 2d 420 (1976); and the Second Circuit in *Langella* v. *Com'r of Corrections*, 545 F. 2d 818 (1976).

Congress created the Title III suppression rule in the image, at least for the purposes of the right to review under 28 U.S.C. § 2254, of the judicial suppression rule as it operated under the then present search and seizure law. That law, which Congress incorporated into Title III's suppression rule, contained no *Davis* limitations on the

availability of § 2254 for review of *Berger-Katz* claims. That law remains, by Congressional mandate, the law of Title III, and any attempt to excise it would substantially disrupt and impair the enforcement scheme Congress constructed, and, in any event, would be beyond the proper scope of judicial power.

B. *Davis does Not Apply to the Fourth Amendment and Title III Claims Raised in this Case.*

There is no doubt that the warrant, failing to set and specify time limits, as required by § 2518(4)(e) and (5) of the Act, is "insufficient on its face" under § 2518(10)(a)(ii) and the evidence obtained as a result is subject to suppression under § 2515 of the Act. The violation charged is not of some technical or tangential provision of the Act. Rather, this is a violation of the highest magnitude. The time limit requirements are not only at the very center of the constellation of wiretap safeguards Title III prescribes to limit wiretap use "to 'the most precise and discriminate circumstances,'" *United States* v. *Donovan, supra,* at 673, n. 25, but they are also a restatement of Fourth Amendment commands given by *Berger* and *Katz*. See *United States* v. *Lamonge*, 458 F. 2d 197 (6th Cir. 1972); S. Rep. No. 1097, p. 2190.

Davis, by its own terms, applies only where there is a "technical error" of procedure. 417 U.S. at 346. There is no conceivable justification for terming the Fourth Amendment and Title III violation committed in this case a "technical error." Consequently, no showing of "prejudice" can be required.

It should also be noted that in requiring a showing of "prejudice" the court below did not simply erect a

procedural barrier to the exercise of habeas jurisdiction. The real consequence of that decision was impermissibly to alter the substantive nature of the rights involved. For neither the Fourth Amendment nor Title III defines the right to time limits or conditions its enforcement on a showing of "prejudice." See *Berger* v. *New York, supra*; *Katz* v. *United States, supra*; and *United States* v. *Giordano, supra*, at 523, and n. 12. Where the constitution and Congress expressly decree a right that requires no showing of prejudice for its enforcement, the courts may not amend the substantive composition of the right through actions labeled "procedural."

Refusal by the court below to review petitioner's Fourth Amendment and Title III claims directly conflicts with the decisions in the District of Columbia, Second and Third Circuits noted above, see *supra*, at 28.[29]

C. *The Court Below Erred in Not Finding Petitioner Sufficiently "Prejudiced" to Warrant Affording him a Federal Forum for his Fourth Amendment and Title III Claims.*

Even assuming federal habeas corpus review can be conditioned on a showing of "prejudice," it is clear that under the circumstances of this case an ample showing of

[29] The decision below also conflicts with the decision of the Seventh Circuit in *United States ex rel. Machi* v. *U.S. Dept. of Prob. & Par.*, 536 F. 2d 179 (1976), extending habeas corpus review under § 2255 to a claim based on § 2516(1) of the Act. No *Davis* bar was perceived by the court to prevent reaching this claim. While the court applied *Davis* to another apparent Title III claim, it is obvious that the court regarded that issue as substantively frivolous and could for that reason have dismissed it outright.

prejudice has been made and the court below erred in not so finding.

The court below held that petitioner was not "prejudiced" by the absence of "the 30-day limit" in the May 10, 1972, wiretap order, as required by § 2518(5) of the Act.[30] But the absence of this limit is not at issue in this case. The critical failures challenged here[31] were the state court's failure to make a determination of how many operating days were "necessary" given the nature and facts of this case, and its failure to set and specify such determination of the necessary operating time limits in the order. The obligation to make this determination is imposed by the first sentence of § 2518(5), and to specify that determination by § 2518(4).

The court's characterization of the failure as a "stenographic error" and not one of substance demonstrates a fundamental misconception of the nature of the violation and its consequences. While the "30-day limit" may be regarded as a "boilerplate" provision whose stenographic omission from the order is inconsequential, the same is definitely not true of the failure to set and specify the operating time. The "30-day limit" instruction applies to all cases and does not reflect a deliberated judgment of the court based on the nature and facts of the given case. But just such a judgment is required in setting operating time limits on the wiretap in compliance with the standard of "necessity."

[30] "The 30-day limit" is one element of the general instruction every warrant must contain that "authority to intercept . . . must terminate upon attainment of the authorized objective, or in any event in 30 days."

[31] The absence of all required time limits constitutes a massive violation of the time limit specification requirements imposed by Title III and the Massachusetts law it incorporates. But the failure of chief consequence involves the absence of the operating time limits.

To suggest that the error was stenographic is to presume unreasonably that the state court necessarily granted the operating time the prosecutor requested.[32] In fact, there is no evidence of what the court determined regarding operating time limits. There is every possibility that under the circumstances in this case the court, had it made the required determination and specified it, would have restricted the operating time to a substantially shorter period than the maximum period requested by the prosecutor. This was a second tap directed at petitioner, it was installed on telephones located in a private home, the earlier tap had intercepted hundreds of phone calls, some entirely private having no import to the criminal investigation, and the request was for the maximum operating time in a case that could hardly be termed extremely serious or difficult to investigate. Other factors — including the court's experience, the Congressional demand for restraint in using even lawful wiretaps, and the judge's intuitive assessment of the realities and personalities involved — might have further reduced the operating time the court would find necessary. In short, petitioner's rights were severely prejudiced because the tap's operating time might or would have been reduced had the state court complied with the Fourth Amendment and Title III.[33]

[32] The stenographic failure to specify the proposed operating time was made in the prosecutor's office, not the judge's. While the prosecutor drafted the order, it remained nothing more than a "proposal" repeating various requests made in the application.

[33] The prosecutor obviously viewed the state court to be a rubber stamp, since he apparently never read the order after it was signed to ascertain the time limits. Both the Fourth Amendment and Title III require wiretap orders to specify the judge's findings as a means of controlling the prosecution. Obviously, this objective is defeated if the prosecutor does not read the order. The failing then was not by the prosecutor's secretary or his proofreading, but by his wanton disregard of the warrant process, which left him free to invade privacy as *he* saw fit. The prosecutor's actions cannot be condoned on the assumption that if he or she goes too far suppression is always an available remedy. For that would be contrary to the basic philosophy behind both the Fourth Amendment and Title III, which is to prevent violations, not repair them. In this case, had the prosecutor read the order he would have discovered the absence of time limits and then could have called the problem to the court's attention for immediate rectification. Since the prosecutor had the opportunity to cure the defect and failed to use it because of his indifference to the court's process, the Commonwealth should be estopped from claiming innocent mistake and from asserting an objection to suppression. Cf. *United States* v. *Pennsylvania Chem. Corp.*, 411 U.S. 655, 674 (1973).

Conclusion.

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANCIS J. DIMENTO,
DIMENTO & SULLIVAN,
100 State Street,
Boston, Massachusetts 02109.

Dated: March 9, 1977.

Appendix.

United States Court of Appeals for the First Circuit

No. 76-1207

FRANCIS A. VITELLO,
PETITIONER, APPELLEE,
v.
CHARLES GAUGHAN, ETC.,
RESPONDENT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(HON. FRANK H. FREEDMAN, *U. S. District Judge*)
[414 F. Supp. 26]

Before COFFIN, *Chief Judge*,
ALDRICH AND CAMPBELL, *Circuit Judges*.

Barbara A. H. Smith, Assistant Attorney General, Criminal Division, with whom *Francis X. Bellotti*, Attorney General, and *John J. Irwin, Jr.*, Assistant Attorney General, Chief, Criminal Bureau, were on brief, for appellant.
Thomas J. Carey, Jr., on brief for Massachusetts District Attorneys Association, amicus curiae.
Francis J. DiMento, with whom *James J. Sullivan, Jr.*, *Philip T. Tierney*, and *DiMento & Sullivan* were on brief, for appellee.

November 8, 1976

ALDRICH, *Senior Circuit Judge*. Petitioner for habeas corpus finds himself in state prison as a result of evidence acquired by a wiretap authorized by a warrant which failed to contain the 30-day limit required by the Omnibus Crime

Control and Safe Streets Act of 1968, 18 U.S.C. § 2518(5). The application for the warrant contained the limitation, but, by secretarial negligence, none was included in the warrant itself. In point of fact, the evidence was acquired in 12 days. On appeal, the Massachusetts court sustained the conviction, *Commonwealth* v. *Vitello,* Mass. Adv. Sh. (1975) 769, 327 N.E. 2d 819, holding that the warrant must be read in conjunction with the application, and that, alternatively, petitioner had no complaint in the absence of prejudice. Petitioner takes the position that, under federal law, since the warrant contains no reference to the application, it must be read on its face, and hence it, and its fruits, are to be treated as void.

While the habeas corpus statute authorizes issuance of the writ to those who are in state custody "in violation of the Constitution[1] *or laws* . . . of the United States," 28 U.S.C. § 2254 (emphasis suppl.), it has never been thought that every error of law in a criminal trial warrants issuance of the writ. *See, e.g., Davis* v. *United States,* 1974, 417 U.S. 333. Indeed, even a constitutional violation will not call for habeas corpus relief where the petitioner was not harmed by the error. *E.g., Booton* v. *Hanauer,* 1 Cir., (9/2/76) F. 2d. ; *Subilosky* v. *Moore,* 1 Cir., 1971, 443 F. 2d 334, *cert. denied,* 404 U.S. 958. We hold that whether or not the state court erred, as a matter of federal law, in reading the warrant and application together,[2] petitioner is not entitled to release since the error, if any, was not prejudicial.

[1] The district court held petitioner's custody to be in violation of the Constitution, a ruling that petitioner concedes cannot stand in view of the Court's subsequent decision in *Stone* v. *Powell,* (7/6/76) —— U.S. ——, holding that habeas corpus relief is not to be afforded for Fourth Amendment claims already litigated in state criminal proceedings.

[2] Petitioner cites as allegedly contrary authority, *Moore* v. *United States,* D.C.Cir., 1972, 461 F.2d 1236; *United States* v. *Meeks,* 6 Cir., 1963, 313 F.2d 464; *United States* v. *Ortiz,* D.Colo., 1970, 311 F.Supp. 880, *aff'd* 445 F.2d 1100, *cert. denied,* 404 U.S. 993.

As the Court said in *Davis* v. *United States,* ante, at 346, quoting *Hill* v. *United States,* 1962, 368 U.S. 424, 428, in determining whether an alleged nonconstitutional error is cognizable on collateral review,

> "the appropriate inquiry [is] whether the claimed error of law [is] 'a fundamental defect which inherently results in a complete miscarriage of justice,' and whether '[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'"

Though *Davis* involved section 2255, we think the test the Court set forth for determining whether an alleged violation of federal law warrants habeas corpus relief is equally applicable to section 2254. *See Hill* v. *United States,* ante, at 428 n.5, *semble.*

It being apparent that no prejudice resulted from the inadvertent omission of a termination date from the warrant, petitioner argues that prejudice need not be shown, and that *Davis* is distinguishable because it did not involve an exclusionary rule. We are not persuaded by petitioner's cases allegedly supporting the proposition that prejudice is irrelevant; counsel fails to note that all of them involve direct, not collateral review, a distinction often pointed out. *See, e.g., Atwell* v. *Arkansas,* 8 Cir., 1970, 426 F. 2d 912, 915. Alternatively, petitioner urges that this is a special case because of Congress' announced concern over unjustified and excessive wiretapping. *See* Omnibus Crime Control and Safe Streets Act of 1968 § 801, 82 Stat. 211. Granted that Congress was interested in deterrence, *see* S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), 1968 U.S. Code Cong. & Admin. News at 2185, clearly it was concerned with substantive excesses, not stenographic error. The fruit of such error should not be a windfall for petitioner.

Reversed; petition dismissed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 76-1207.

FRANCIS A. VITELLO,
PETITIONER, APPELLEE,

v.

CHARLES GAUGHAN, ETC.,
RESPONDENT, APPELLANT.

JUDGMENT.

Entered November 8, 1976.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is vacated and the cause is remanded with directions to dismiss the petition.

By the Court:

DANA H. GALLUP,
Clerk.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FRANCIS A. VITELLO

CIVIL ACTION
No. 75-3077-F

v.

CHARLES GAUGHAN, as he is
Superintendent of the
Massachusetts Correctional
Institution, Bridgewater

Memorandum and Order.

April 9, 1976.

FREEDMAN, D.J.

This matter is before the Court on a petition for writ of habeas corpus. Petitioner Francis A. Vitello was convicted of various violations of the gambling laws of the Commonwealth and sentenced to prison. These convictions were upheld by the Supreme Judicial Court, *Commonwealth* v. *Vitello*, 1975 Mass. Adv. Shts. 769, 327 N.E. 2d 819. Vitello bases his present attack upon a narrow aspect of one of the two wiretap warrants used in the prosecution of the case.

The facts necessary for a determination of the issue can be briefly stated.[1] On May 10, 1972, a state judge issued a warrant authorizing certain telephone wiretaps for use in the gambling investigation which resulted in petitioner's challenged conviction. The warrant was defective on its face as it did not contain a termination date for the wiretap interceptions as required by 18 U.S.C. § 2518(4)(e) and the Fourth and Fourteenth Amendments. The application for the warrant, however, did include such a termination date. The parties agree that the only issue before the Court is whether the application may be read with the warrant to supply the necessary termination date or whether the warrant must stand alone and thus fail. *See Berger* v. *New York*, 388 U.S. 41 (1967).

The thrust of petitioner's argument is that there must be some affirmative reason to permit a reviewing court to rely upon the application to uphold a facially defective warrant. Reference to the application would be permitted, he argues, if there were an ambiguity on the face of the warrant, or if the application were incorporated by reference, or if the application had been physically attached to the warrant. None of these exceptions is available in the instant case; and thus, petitioner contends, the warrant cannot be saved.

Vitello relies upon *United States* v. *Lamonge*, 458 F. 2d 197 (6th Cir.), *cert. denied*, 409 U.S. 863 (1972), as support for his position. While *Lamonge* was concerned with a facially invalid warrant, the means the prosecution used in attempting to cure it were quite different from those used in this case. There the prosecutor attempted to amend the warrant by motion at trial. No attempt was made to read the warrant with the application — the procedure advocated here. Apparently petitioner cites *Lamonge* for the

[1] A more exhaustive statement of the facts may be found in the Supreme Judicial Court opinion, *Commonwealth* v. *Vitello, supra*.

proposition that a facially invalid warrant cannot be saved. Plainly, this is not the law, *see, e.g., United States* v. *Tortorello*, 480 F. 2d 764 (2nd Cir.), *cert. denied*, 414 U.S. 866 (1973), (affidavits specifically incorporated into wiretap orders). The narrow question for this Court is whether there is some factor in this case which would permit the application to be read with the warrant. *Lamonge* does not address this issue.

Another of the cases cited by petitioner, however, is persuasive authority for his position. In *Moore* v. *United States*, 461 F. 2d 1236 (D.C. Cir. 1972), the court in upholding a warrant, defined those circumstances in which the affidavit is to be read with the warrant:

> There is a fundamental distinction between the warrant and the underlying affidavit, and the affidavit is not necessarily either part of the warrant or available for defining the scope of the warrant.
>
> . . . . . .
>
> However, the warrant may properly be construed with reference to an affidavit for purposes of sustaining the particularity of the premises to be searched, provided (1) the affidavit accompanies the warrant, and in addition (2) the warrant uses "suitable words of reference" which incorporate the affidavit by reference. (Footnote and citations omitted.) *Id.* at 1238

The *Moore* court's formula for determining when the supporting papers can be read with a warrant does not seem to include a situation such as the one in this case where no reference to the application or physical attachment of the application is present. *See, also, United States* v. *Ortiz*, 311 F. Supp. 880, 883 (D. Colo. 1970), *aff'd.* 445

F. 2d 1100 (10th Cir.), *cert. denied*, 404 U.S. 993 (1971), and *United States* v. *Meeks*, 313 F. 2d 464, 466 (6th Cir. 1963).

As petitioner carefully documents in his memorandum the reasoning of the Commonwealth's principal authority, *United States* v. *Manfredi*, 488 F. 2d 588 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974), cannot bear close scrutiny. That case seems to stand for the principal that even in the absence of the special circumstances outlined above an affidavit may nevertheless be read with a warrant to supply the necessary elements. *Manfredi* relied upon *United States* v. *Tortorello, supra*, as supporting this proposition. *Tortorello* cannot be extended that far, however, since the warrant in that case specifically incorporated the affidavit. The bald assertion in *Manfredi* that supporting papers may be used to validate a warrant appears to be unsupported in prior case law.[1] Accordingly, I am persuaded that petitioner is entitled to prevail on this issue.

The alternative ground advanced by the Commonwealth for upholding the warrant is that the police officer upon whose affidavit the assistant district attorney based his application for the warrant participated in the execution of the warrant. Thus, respondent argues, the information contained in the supporting papers may be imputed to the officer and the missing termination date thereby supplied. The authority for this assertion is *Commonwealth* v. *Todisco*, 1973 Mass. Adv. Shts. 613, 294 N.E. 2d 860.

[1]It may also be that *Manfredi* is factually distinguished since it was the minimization requirement that was omitted from the order, not the termination date as in this case. Some courts do not regard the absence of minimization instructions as substantial, *see, e.g.*, *United States* v. *Baynes*, 400 F. Supp. 285, 309 (E.D. Pa. 1975). [West Publishing Co. has cited this case as affirmed without opinion, 517 F. 2d 1399. This is incorrect; no final action has yet been taken in this case by the Third Circuit.]

Petitioner contends that *Todisco* should not be followed because it was wrongly decided and that, in any event, this Court is not bound by it. I do not reach these contentions because it is clear that the facts of this case are distinguishable from those of *Todisco*. In *Todisco* there was simply an affidavit and a search warrant. The affiant executed the warrant and when faced with an ambiguity was able to resolve it based upon the facts in the affidavit. In the instant case the termination date which respondent seeks to have the Court read into the warrant is contained in the *application* of the assistant district attorney, not in the police officer's *affidavit*. To permit an incorporation of the application in this case would amount to an extension of *Todisco* justified neither by the cited authority nor by reference to Fourth Amendment principles. The oft-cited line from *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965) that ". . . affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion.", is inapposite in this context and cannot correct the otherwise invalid warrant.

For the foregoing reasons the Court finds the May 10, 1972, warrant to be constitutionally defective. The writ of habeas corpus shall issue unless within ninety (90) days from the date this Order becomes final the Commonwealth shall have begun proceedings to retry the petitioner.

FRANK H. FREEDMAN,
United States District Judge.

Constitution of the United States.

The Fourth Amendment to the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Omnibus Crime Control and Safe Streets Act of 1968.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 provides in pertinent part:

> **§ 2515. [Prohibition of use as evidence of intercepted wire or oral communications.]**
>
> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

> **§ 2516. [Authorization for interception of wire or oral communications.]**
>
> . . . . . .
>
> (2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

> **§ 2518. [Procedure for interception of wire or oral communications.]**
>
> . . . . . .
>
> (4) Each order authorizing or approving the interception of any wire or oral communication shall specify —

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon

attainment of the authorized objective, or in any event in thirty days.

. . . . . .

(10) (a) Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that —

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

United States Code, Title 28.

Sections 2241 and 2254 of 28 U.S.C. provide in pertinent part:

§ 2241. [Power to grant writ.]

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application of hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless —

. . . . . .

(3) He is in custody in violation of the Constitution or laws or treatises of the United States; . . .

§ 2254. [State custody; remedies in Federal courts.]

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Massachusetts General Laws, Chapter 272.

Section 99 of Massachusetts General Laws, Chapter 272, provides in pertinent part:

[Eavesdropping, Wire Tapping, and Other Interception of Communications.]

. . . . . .

I. Warrants: form and content.

A warrant must contain the following:

1. The subscription and title of the issuing judge; and

2. The date of issuance, the date of effect, and termination date which in no event shall exceed thirty days from the date of effect. The warrant shall permit interception or oral or wire communications for a period not to exceed fifteen days. If physical installation of a device is necessary, the thirty-day period shall begin upon the date of installation. If the effective period of the warrant is to terminate upon the acquisition of particular evidence or information or oral or wire communication, the warrant shall so provide; and

3. A particular description of the person and the place, premises or telephone or telegraph line upon which the interception may be conducted; and

4. A particular description of the nature of the oral or wire communications to be obtained by the interception including a statement of the designated offense to which they relate; and

5. An express authorization to make secret entry upon a private place or premises to install a specified intercepting device, if such entry is necessary to execute the warrant; and

6. A statement providing for service of the warrant pursuant to paragraph L except that if there has been a finding of good cause shown requiring the postponement of such service, a statement of such finding together with the basis therefor must be included and an alternative direction for deferred service pursuant to paragraph L, subparagraph 2.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS: SUPERIOR COURT

SUFFOLK TO WIT:

TO THE DISTRICT ATTORNEY FOR THE COUNTY OF SUFFOLK, HIS SPECIALLY DESIGNATED ASSISTANT DISTRICT ATTORNEY, AND HIS DESIGNATED INVESTIGATIVE AND LAW ENFORCEMENT OFFICERS:

GREETING:

Whereas, application in writing under oath, supported by Affidavits, has been made before me this day, the subscriber hereto, REUBEN L. LURIE, a Justice of the Superior Court of the Commonwealth, for an order authorizing and directing the interception of wire communications pursuant to Mass. General Laws, Chapter 272, Section 99; complaining that two females, "MILLY" and "MARY", a more complete description being unknown to the Commonwealth at this time, who are now working at 28 Meyer Street, Roslindale section of the City of Boston and using two telephones located therein, 323-1012 and 327-5892, in order to violate Mass. General Laws, Chapter 271, Section 17 and to conspire to violate the same; have conducted, are conducting, and will continue to conduct from said 28 Meyer Street, criminal activities connected with a continuing conspiracy by means of a highly organized and disciplined organization to engage in supplying illegal goods and services, namely; violation of Section 17, Mass. General Laws, Chapter 271, contrary to the laws of this Commonwealth, and that they communicate by means of the telephones between and among themselves in furtherance of such conspiracy, that these communications are made by

MARY and MILLY to FRED VITELLO, to a Wire Service and to diverse individuals named in the attached Affidavits and amongst and between any or all of them, and any other person or persons unknown concerning unlawful Gaming by means of the telephone instruments located on the above described premises at 28 Meyer Street, and that said instruments 323-1012 and 327-5892 are of this date both listed to WILLIAM P. WEST as subscriber at said address according to the records of the New England Telephone and Telegraph Company, and used by said MILLY and MARY and other diverse individuals and persons unknown at this time who send and receive wire communications concerning unlawful Gaming and violations of Section 17 of Mass. General Laws, Chapter 271, and conspire to violate the same.

Whereas the application for authority to intercept the wire communications as aforesaid complies with the provisions, purposes and procedures of Section 99, Chapter 272, Mass. General Laws, as Amended, and finding probable cause supportive of these presents, WE COMMAND you and each of you forthwith, with necessary and proper systems to INTERCEPT any communications transmitted over, from, and to the telephone instrument of WILLIAM P. WEST, located at 28 Meyers Street, Roslindale section of Boston, Massachusetts, and to tap and make connection with any and all wires leading to the telephone instruments as of this date numbered 323-1012 and 327-5892, with a purpose to obtain evidence of the unlawful activities of MARY, MILLY, FRED VITELLO, FRANK VITELLO and other persons as described in the Affidavit submitted with said application and a person or persons unknown at this time concerning Unlawful Gaming and violations of Section 17, Mass. General Laws, Chapter 271, and to aid in the apprehension and discovery of the persons herein named and their unknown confederates in crime, and that such interception procedure shall not automatically terminate when the type of communication described in the Application and Affidavit has been first obtained, but shall continue until communications are intercepted which reveal the details of said violations or the said conspiracy and the identity of participants therein and the extent of the violations and the location or locations involved therein because the Application alleges, and it is found as a fact that good cause, special important facts, and exigent circumstances exist to require the postponement of service of a copy of the within warrant until after the expiration of this and related investigations, but not later than three (3) years thereafter, and that the evidence obtained by authority of these presents be dealt with according to law, and return this warrant with your doings thereon.

You are therefore authorized and directed with all necessary assistants to install leased lines for the interception of said wire communications. The leased lines used in the execution of this warrant is to consist of a private telephone line installed at a place designated by ROBERT SNIDER, specially designated Assistant District Attorney. The leased line is to be supplied by the New England Telephone & Telegraph Co. pursuant to this order and warrant.

WITNESS, my hand and seal on this date of issuance the 10th day of May, 1972.

REUBEN L. LURIE,
Suffolk Superior Court.

In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1255.

FRANCIS A. VITELLO,
PETITIONER,

v.

CHARLES GAUGHAN, SUPERINTENDENT,
MASSACHUSETTS CORRECTIONAL INSTITUTION, BRIDGEWATER,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Brief of the Respondent in Opposition.

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MISCELLANEOUS.

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ON PETITION FOR A WRIT OF CERTIORARI
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FOR THE FIRST CIRCUIT.

Brief of the Respondent in Opposition.

Respondent is not dissatisfied with petitioner's citation of opinions below or his statement of jurisdiction.

Questions Presented.

1. Whether a state prisoner, who has had an opportunity fully to litigate in the state court his claim that evidence derived from electronic surveillance which was admitted at trial was obtained in violation of the Fourth Amendment to the United States Constitution, is entitled to further collateral review of that claim by way of a petition for writ of habeas corpus?

2. Whether an alleged violation of 18 U.S.C. § 2518 presents sufficient grounds for relief pursuant to 28 U.S.C. § 2254, under the rule of *Davis* v. *United States*, 417 U.S. 333 (1974)?

3. Whether the inadvertent omission of a termination date in a court order authorizing electronic surveillance constitutes error requiring the grant of a writ of habeas corpus?[1]

Statement of the Case.

This is a petition for writ of certiorari to the United States Court of Appeals for the First Circuit.

[1] In the statement of issues presented No. 5 (Petition, p. 3), the impression is created that evidence was intercepted as a result of the operation of the wiretap for a period greater than that legally permissible. The opposite is correct. The operation of the wiretap was concluded in 12 days, while the legally permissible period, and the period requested in the application, was 15 days.

Petitioner, for the first time, appears to argue that the alleged error concerns the failure to establish that a certain period, no more than 15 days, was "necessary" (Petition, pp. 5-7, 9, 31). This argument was never presented to the courts below and is therefore not properly before this Court. *Adickes* v. *Kress & Co.*, 398 U.S. 144 (1970).

A. Prior Proceedings.

The petitioner and several others were convicted, after a trial by jury, in the Superior Court of the Commonwealth of Massachusetts on indictments charging violations of various gaming laws. The convictions were affirmed by the Supreme Judicial Court of the Commonwealth. *Commonwealth* v. *Vitello*, Mass. Adv. Sh. (1975) 769, 327 N.E. 2d 819.[2]

The petitioner then filed a petition for writ of habeas corpus in the Federal District Court for the District of Massachusetts.

On April 9, 1976, the District Court ordered that the "writ of habeas corpus shall issue" (Petition, A. 9a).

Respondent appealed to the Court of Appeals for the First Circuit. On November 8, 1976, the court vacated the order of the District Court and remanded the cause with directions to dismiss the petition (Petition, A. 4a).

B. Statement Of Facts.

In the course of an investigation into organized gaming activities, the District Attorney's Office applied for and

[2] The Supreme Judicial Court, relying upon its prior decision in *Commonwealth* v. *Todisco*, 363 Mass. 445 (1973), held that the application in support of the warrant could, according to Massachusetts law, be read together with the warrant and, so read, the duration of court-ordered interception was properly limited. The Supreme Judicial Court's approach is consistent with the reasoning of the federal courts. *United States* v. *Tortorello*, 480 F. 2d 764 (2d Cir. 1973); *United States* v. *Manfredi*, 488 F. 2d 588 (2d Cir. 1973); *United States* v. *Cirillo*, 499 F. 2d 872 (2d Cir. 1974); *United States* v. *Poeta*, 455 F. 2d 117 (2d Cir. 1972). But see *Moore* v. *United States*, 461 F. 2d 1236 (D.C. Cir. 1972).

received two court orders authorizing electronic surveillance pursuant to Mass. Gen. Laws, c. 272, § 99. On April 24, 1972, an order authorizing electronic surveillance, based upon the application of a specially designated Assistant District Attorney and the affidavit of Officer John C. O'Malley, issued (App. A, pp. 1a-3a, *infra*). On May 10, 1972, upon application and affidavit of the same parties (App. B, pp. 4a-17a, *infra*), a second order authorizing electronic surveillance was issued by the same judge of the Superior Court of Massachusetts (App. C, pp. 18a-20a, *infra*). The application for the order issued on May 10, 1972, contained the following language:

> "(11) That the interception is required to be maintained for a period of 15 calendar days, commencing on the date of installation of the intercepting device, and that the hours of each day during which wire communications may be reasonably expected to occur are those between the hours of 11:00 a.m. to 7:30 p.m." (App. B, pp. 8a-9a, *infra*.)[3]

The warrant authorizing the interception signed on May 10, 1972, did not include this provision.[4]

On the motion to suppress prior to the state court trial, the Assistant District Attorney, who had made application for the warrant, testified that he had intended to apply only for a 15-day interception but that through typographical

[3] An identical provision appeared in the April 24, 1972, application and in the warrant issued on April 24, 1972, authorizing electronic surveillance contained similar words of limitation on the period for which interception was authorized.

[4] Contrary to petitioner's assertion (Petition, p. 8), the proposed May 10 order did not contain "blanks" susceptible of being filled in by the court (App. C). Rather, the entire section relating to time limits was omitted.

error and a failure to proofread accurately, the provision limiting the period of interception was omitted from the proposed copy of the order. The trial court found, and the Supreme Judicial Court agreed, that: "By error and inadvertence, the lines in the warrant relating to the time limitations . . . [were] not typed in by the typist. . . ." *Commonwealth* v. *Vitello*, *supra*, 327 N.E. 2d at 846. The interception was concluded in 12 days. *Vitello* v. *Gaughan*, 544 F. 2d 17, 18 (1st Cir. 1976).

Reasons For Not Granting The Writ.

I. The Court of Appeals Properly Applied Stone v. Powell, ____ U.S. ____, 96 S. Ct. 3037 (1976), To the Instant Case.

Petitioner's claim under the Fourth Amendment is not cognizable upon a petition for writ of habeas corpus. *Stone* v. *Powell*, ____ U.S. ____, 96 S. Ct. 3037 (1976).

Stone bars relief regardless of whether oral statements or tangible items are the subject of the seizure complained of. In fact, it would appear that physical entry is the area of primary protection. *United States* v. *United States District Court of Michigan*, 407 U.S. 297 (1972). Petitioner's assertion that *Stone* does not bar raising a claim based upon the exclusionary rule as enunciated by Congress in 18 U.S.C. §§ 2510-2520 misapprehends the import of the *Stone* decision in two important respects.

First, in *Stone* the Court did not diminish the scope or effect of the exclusionary rule itself, but addressed itself to the scope of habeas corpus and to the issues cognizable thereupon. Clearly, the Court has historically had the

power to alter the scope of the writ. *Brown* v. *Allen*, 344 U.S. 443 (1953); *Fay* v. *Noia*, 372 U.S. 391 (1963); *Estelle* v. *Williams*, 425 U.S. 501 (1976); *Francis* v. *Henderson*, 425 U.S. 536 (1976).

Second, while *Stone* involved an exclusionary rule judicially created to effectuate rights secured by the Fourth Amendment, *Stone* at 3046, the rule embodied in 18 U.S.C. §§ 2515 and 2518(10)(a) is no more than a Congressional endorsement or codification of that judicially fashioned exclusionary rule. The legislative history of 18 U.S.C. §§ 2510-2520 demonstrates that the legislation was enacted in response to *Berger* v. *New York*, 388 U.S. 41 (1967):

> "Title III was drafted to meet these [*Berger*] standards and conform with *Katz* v. *United States*, 88 S. Ct. 507, 389 U.S. 347 (1967)." Senate Report No. 1097, U.S. Code Cong. & Adm. News (1968), at 2153.

Therefore, respondent suggests there is no difference, in either purpose, scope or effect, between the exclusionary rule enacted by Congress and that which was judicially created. Therefore, the same considerations which preclude the grant of federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial, operate to foreclose collateral review in the context of the instant case. These considerations include:

> "(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine

> of federalism is founded." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 259 (1973) (Powell, J., concurring).

Balancing these societal and judicial interests against those of petitioner, who makes no claim to innocence and who suffered no prejudice as a result of the inadvertent defect in the warrant, requires, respondent suggests, the same result in this case as reached in *Stone* v. *Powell*, *supra*.

The Court of Appeals did not err in applying *Stone* to the instant case. Moreover, application of *Stone* to a case in which the District Court's consideration of the Fourth Amendment claim predated that decision is consistent with the effect accorded by other circuits. *Bracco* v. *Reed*, 540 F. 2d 1019 (9th Cir. 1976); *Roach* v. *Parratt*, 541 F. 2d 772 (8th Cir. 1976); *Chavez* v. *Rodriguez*, 540 F. 2d 500 (10th Cir. 1976).

II. Collateral Relief Is Not Available For Petitioner's Title III Claim.

A. *Davis v. United States, 417 U.S. 333 (1974), Is Applicable To A Proceeding Brought Under 28 U.S.C. § 2254.*

Davis v. *United States*, 417 U.S. 333 (1972), formulated the test for determining when an error of law, not of constitutional dimension, may be raised on collateral attack.

The impact of the *Davis* decision is not limited to proceedings under 28 U.S.C. § 2255. Although the *Davis* opinion did not specifically state its applicability to § 2254 proceedings, it is apparent from its language and its histori-

cal references that its holding applies not only to § 2255, but also to proceedings for state prisoners under § 2254.

The Court stated, ". . . there can be no doubt that the grounds for relief under § 2255 are equivalent to those encompassed by § 2254," and ". . . the unambiguous legislative history show[s] that § 2255 was intended to mirror § 2254 in operative effect." *Davis*, *supra*, 417 U.S. at 344.[5]

Since federal habeas corpus and § 2255 are equivalent "in operative effect," it follows that the test for determining when an error of law may receive collateral review is equally applicable to both proceedings.

B. *Petitioner's Claim Of Error Does Not Merit Collateral Review Under The Davis Test.*

Not "every asserted error of law can be raised" on collateral attack. The inquiry to be made of a petition attacking a sentence on the basis of a non-constitutional error of law is,

> "whether the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice,' and whether '[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent.'" *Davis*, *supra*, at 346.

[5] There is no indication in *Davis*, or in any other opinion, that § 2255 grounds for relief are less extensive than habeas corpus grounds, as petitioner appears to argue in his brief at p. 26. The grounds for review of claims of federal prisoners and of state prisoners in collateral proceedings are identical, except that a § 2255 court need not be concerned with the adequacy of the Federal Rules of Criminal Procedure. *Kaufman* v. *United States*, 394 U.S. 217 (1969). See generally, Roberts, *Davis* v. *United States*: *Intervening Change In Law As A Non-Constitutional Ground For Federal Collateral Relief*, 7 Colum. Human Rights L. Rev. 389 (Spring-Summer, 1975).

Thus, "th[is] Court stressed that the magnitude of any claimed error was also a threshold consideration." *McRae* v. *United States*, 540 F. 2d 943, 945 (8th Cir. 1976).[6]

While *Davis* for the first time held that an error of federal law not of a constitutional dimension is cognizable on collateral attack, it did not establish a new standard for judging collateral attacks. "It merely applied the constitutional standard already applicable to procedural due process questions to substantive matters not protected by the Constitution." *Bachner* v. *United States*, 517 F. 2d 589, 599 (7th Cir. 1975). That was the standard applied in *Hill* v. *United States*, 368 U.S. 424 (1962), from which the *Davis* test is fashioned.

In *Hill*, the petitioner claimed that he was entitled to collateral relief because of the District Court's failure to permit him to speak in his own behalf, contrary to Rule 32(a) of the Federal Rules of Criminal Procedure. In denying relief, the Court said that "collateral relief is not available when all that is shown is a failure to comply with the formal requirements of the Rule." *Hill*, *supra*, 368 U.S. at 429.

[6] Neither Title III nor any other "law" automatically determines that its violation is an "exceptional circumstance" entitling a petitioner to collateral review. See *United States ex rel. Machi* v. *United States Department of Prob. and Par.*, 536 F. 2d 179 (7th Cir. 1976). Respondent does not assert that a claim of a "fundamental defect" under Title III would never present "exceptional circumstances" meriting collateral relief, and therefore finds no conflict between the decision in this case and the opinions cited in petitioner's brief at p. 28.

Mr. Justice Stewart contrasted a "technical error" which results in no prejudice to a defendant with the alleged error in *Davis* which results in "conviction and punishment . . . for an act that the law does not make criminal," an error bearing on the petitioner's guilt or innocence. *Davis*, *supra*, 417 U.S. at 346.

The technical error in the wiretap warrant is clearly not a "fundamental defect" which resulted "in a complete miscarriage of justice." Indeed, the error claimed by petitioner does not even rise to the level of the alleged error in *Hill*. The time limitations, inadvertently omitted from the warrant, were strictly complied with, and the petitioner was in no way prejudiced by the error. Furthermore, there is no question here of the error bearing on the petitioner's guilt or innocence.

Moreover, it is only when there are "exceptional circumstances" that even a "fundamental defect" results in the right to collateral review. The origins of this requirement demonstrate that it has demanded specific circumstances for satisfaction. "Those are (1) when the error was not correctible on appeal, or (2) when there are exceptional circumstances excusing the failure to appeal."[7]

As further illustrated by *Davis*, on those occasions where a "flagrant error"[8] has survived direct appeal and there is no other remedy available for its correction, collateral relief is available for correction of the "fundamental defect."

[7] See 7 Colum. Human Rights L. Rev., *supra*, at 399-400, for a review of cases which constitute "exceptional circumstances": those where resort to remaining available remedies would be futile, *Layton* v. *Carson*, 479 F. 2d 1275 (5th Cir. 1973), or where pursuit of remaining remedies would result only in "repetitious applications," *Wilwording* v. *Swenson*, 404 U.S. 249, 250 (1971), or where an "erroneous doctrine" upon which the court acted required prompt correction, *Ex parte Hudgings*, 249 U.S. 378 (1919), or where a conflict of state and federal authorities over an important question of jurisdiction needed resolution, *Bowen* v. *Johnston*, 306 U.S. 19 (1939).

[8] *Sunal* v. *Large*, 332 U.S. 174, 179 (1947).

This case presents no "exceptional circumstances" that justify collateral relief under § 2254. Petitioner availed highest court of the Commonwealth and had the opportunity to seek direct review in the United States Supreme Court through application for a writ of certiorari.

Therefore, petitioner's Title III claim, based on an inadvertent stenographic mistake which resulted in the time limit for electronic surveillance being omitted from the face of the warrant, clearly does not rise to the magnitude of a "flagrant error" or "fundamental defect" entitling him to release.

III. The Error Complained Of In The Instant Case Is Not Of Such Magnitude As To Require Relief On A Petition For A Writ Of Habeas Corpus.

Respondent suggests that the First Circuit Court of Appeals did not err in requiring that prejudice be demonstrated before release would be granted. Petitioner, however, appears to argue that any type of noncompliance with 18 U.S.C. § 2518 requires suppression. This Court has eschewed such a per se approach. In *United States* v. *Chavez*, 416 U.S. 562, 574 (1974) (inadvertent misidentification of Assistant Attorney General authorizing the wiretap application), this Court recognized that not every violation of Title III resulted in an unlawful interception. Consistently, the various Circuit Courts of Appeals have considered whether a requirement was deliberately ignored and whether any tactical advantage was gained. In the absence of such a finding, the alleged error has been held not to require suppression. *United States* v. *Civella*, 533 F. 2d 1395 (8th Cir. 1976), *cert. denied*, 20 Cr. L. 4170 (1977);

United States v. *Doolittle*, 518 F. 2d 500 (5th Cir. 1975), *cert. denied*, 20 Cr. L. 4199 (1977). Therefore, respondent submits that, even were petitioner's claim deemed to be proper for consideration pursuant to a petition for writ of habeas corpus, suppression under federal law was not required because the omission was inadvertent, the surveillance was concluded within 12 days (thus satisfying the purpose underlying the enactment of § 2518(4)(e)), there was no allegation of bad faith on the part of the government and no advantage to the Commonwealth or prejudice to the defendant resulted from the inadvertent omission and, of course, petitioner makes no claim of innocence.

Conclusion.

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

FRANCIS X. BELLOTTI,
Attorney General,
STEPHEN R. DELINSKY,
Assistant Attorney General,
Chief, Criminal Bureau,
BARBARA A. H. SMITH,
Assistant Attorney General,
Chief, Criminal Appellate Section,
One Ashburton Place, 18th Floor,
Boston, Massachusetts 02108.
(617) 727-2240

Of Counsel:
JANE H. MALME,
Legal Intern.

Appendix A.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK TO WIT:

TO THE DISTRICT ATTORNEY FOR THE COUNTY OF SUFFOLK, HIS SPECIALLY DESIGNATED ASSISTANT DISTRICT ATTORNEY, AND HIS DESIGNATED INVESTIGATIVE AND LAW ENFORCEMENT AGENTS:

GREETING:

Whereas, application in writing under oath, supported by affidavits, has this day been made before me, the subscriber, a Justice of the Massachusetts Superior Court, complaining that Ralph "Fred" Vitello, further described as a white male, 50 years old, about five feet eight inches tall, now residing at 165 Hackensack Road, West Roxbury and using telephone #327-5527 at S-2 102 Cass Street, West Roxbury and other diverse individuals named in the attached affidavits and person or persons unknown, have conducted, are conducting and will continue to conduct from said apartment, 102 Cass Street, West Roxbury section of the City of Boston, Massachusetts, criminal activities connected with a continuing conspiracy by means of a highly organized and disciplined organization, to engage in supplying illegal goods and services, namely, violations of Section 17 of G.L. Chapter 271, contrary to the laws of this Commonwealth, and that they communicate by means of the telephone between and among themselves in furtherance of such conspiracy, that these communications are made by Ralph "Fred" Vitello, and diverse individuals named in the attached affidavits and

amongst and between any or all of them, and any other person or persons unknown concerning unlawful gaming by means of a telephone instrument located on the above described premises at 102 Cass Street, and that said instrument is of this date, numbered as 327-5527 and listed to James M. Vitello as subscriber at said address according to the records of the New England Telephone and Telegraph Company, and used by said Ralph "Fred" Vitello and other diverse individuals and persons unknown at this time who send and receive wire communications concerning unlawful gaming and violations of Section 17 of G.L. Chapter 271.

Whereas the application for authority to intercept the wire communications as aforesaid complies with the provisions, purposes and procedures of Section 99, Chapter 272, General Laws, as amended, and finding probable cause supportive of these presents, WE COMMAND you and each of you forthwith, with necessary and proper systems to INTERCEPT any communications transmitted over, from, and to the telephone instrument of James M. Vitello, located in Suite 2 at 102 Cass Street, West Roxbury section of the Boston, Massachusetts, and to tap and make connection with any and all wires leading to the telephone instrument as of this date numbered 327-5527, with a purpose to obtain evidence of the unlawful activities of Ralph "Fred" Vitello, James M. Vitello, other persons as described in the affidavit submitted with said application and a person or persons unknown at this time concerning unlawful gaming and violations of Section 17, G.L. Chapter 271, and to aid in the apprehension and discovery of the persons herein named and their unknown confederates in crime, and that such interception procedure be employed for a period not exceeding 15 days, from 11:00 a.m. to 7:30 p.m. within the 30-days next following the date of the installation of the intercepting device pursuant thereto, and without limita-

tions of automatic termination because the application alleges, and it is found as a fact that circumstances of exigency do exist, and the same exigency permits and requires postponement of service of a copy of the within warrant until after the expiration of this and related investigations, but not later than three (3) years thereafter, and that the evidence obtained by authority of these presents be dealt with according to law, and return this warrant with your doings thereon.

WITNESS, my hand and seal on this day of issuance, the 24th day of April, 1972.

REUBEN L. LURIE,
Suffolk Superior Court.

Appendix B.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. SUPERIOR COURT.

Application of Robert Snider, Assistant District Attorney, Suffolk District, for a Wiretap Warrant.

I, ROBERT SNIDER, specially designated Assistant District Attorney of the Suffolk District, being duly sworn, state:

(1) That I am a duly appointed and sworn Assistant District Attorney of the Suffolk District within the meaning of Mass. General Laws, Chapter 272, Section 99.

(2) That I have been specially designated by District Attorney GARRETT H. BYRNE, to make application exparte to a Judge of competent jurisdiction for a warrant or warrants or renewals thereof to intercept wire or oral communications running to and from the telephone lines servicing the telephones numbered 323-1012 and 327-5892; both being located in 28 Meyer Street, Roslindale, Mass.; and that a true copy of a letter of District Attorney BYRNE is attached to this Application and marked "A".

(3) GARRETT H. BYRNE is the duly elected District Attorney of the Suffolk District.

(4) That upon my information and belief, and the facts as alleged in Affidavits presented herewith, there is probable cause to believe that a highly organized and continuing conspiracy exists in Suffolk County and especially in the West Roxbury-Roslindale area to supply illegal goods and services, to wit: to violate Section 17 of Chapter 271 of the Mass. General Laws; that the person or persons who control and organized said conspiracy and reap its profits

have insulated himself or themselves from apprehension and prosecution by using others.

(a) On April 24, 1972, I appeared before REUBEN L. LURIE, Judge of the Massachusetts Superior Court, Suffolk County, a Judge of competent jurisdiction pursuant to Mass. General Laws, Chapter 272, Section 99(B(9)) and (F(1)) and submitted an Application for a Wiretap Warrant to intercept wire or oral communications running to and from the telephone numbered 327-5527, located in Suite 2 at 102 Cass Street, West Roxbury, a copy of which is attached hereto and marked "B", together with the Affidavit of JOHN C. O'MALLEY, Detective, Boston Police Department (a copy of which is attached hereto and marked "C"). On the same day, April 24, 1972, a Warrant was issued authorizing and directing that wire and oral communications over said telephone be intercepted for a period not exceeding 15 days, from 11:00 a.m. to 7:30 p.m. within the 30 days next following the date of the installation of the intercepting device. A copy of said Warrant is attached hereto and marked "D". The intercepting device was installed and commenced interceptions and recording of communications at 11:00 a.m. on April 25, 1972. It is respectfully requested that all the allegations, information, beliefs, facts and inferences and opinions drawn therefrom contained within said Application marked "B" and in said Affidavit marked "C" be considered a part of this Application and, by reference, made a part hereof because there is probable cause to believe that said telephones 323-1012 and 327-5892 are part of the same conspiracy described therein, but are higher in the hierarchy of the organization of said conspiracy.

(b) That the recorded communications intercepted pursuant to said Warrant marked "D" indicate that "MILLY" and "MARY", two females at 28 Meyer Street using tele-

phones 323-1012 and 327-5892, are working with FRED VITELLO for FRANK VITELLO; that MILLY takes Number Play. She is also in contact with the wire service which provides her with the daily number and with Racing results which she relays to FRED VITELLO and probably others, a service necessary to the maintenance of this conspiracy and to its operation. All of said activities being violations of Mass. General Laws, Chapter 271, Section 17 or constituting conspiracy to violate the same and that the person or persons; such as FRANK VITELLO and those who operate the wire service and who control and organize said conspiracy or conspiracies and reap its profits have insulated themselves from apprehension and prosecution by using others and by conducting much or all of their illegal activities over the telephone.

(5) The source of my information and belief is the facts related to me by Officer JOHN C. O'MALLEY, affiant of the attached Affidavits, who is well known to me as a Boston Police Officer attached to the Suffolk District Attorney's Office and the other Officers identified in said Affidavit.

(6) Based upon the facts contained in said Affidavits and the reasonable inferences that may be drawn from them by Officers who have had, as detailed in said Affidavits, years of experience in investigating violations of Section 17, Mass. General Laws, Chapter 271, there is probable cause to believe that wire communications of "MARY" and "MILLY", a better description of them being unknown to us at this time, but who have spent their time approximately between 11:30 a.m. to 6:30 p.m. every working day at 28 Meyer Street, Roslindale using at least two phones at said 28 Meyer Street according to the records of the New England Telephone Company, listed to WILLIAM P. WEST of said address, numbered 323-1012 and 327-5892, will not only constitute evidence of the fact that a designated offense has

been, is being and will continue to be committed but that information will be obtained which will aid in the apprehension of a person or persons who I have probable cause to believe has committed, is committing and will continue to organize and control violations of Section 17, Mass. General Laws, Chapter 271.

(7) That the wire communications of said MILLY and MARY will occur at 28 Meyer Street, Roslindale section of the City of Boston, Suffolk County, being a residence and described further as a 2-½ story, wood frame dwelling with green aluminum siding, and will occur on the telephones numbered 323-1012 and 327-5892.

(8) The nature of the wire communications sought to be intercepted and overheard is communication necessary to and adapted for, the conduct of Gaming and conspiracy to commit such Gaming in violation of Section 17 of Mass. General Laws, Chapter 271; such as:

(a) The keeping of a building or a room, or any part thereof, or occupying such a building, room, or any part thereof with apparatus, books and devices for registering bets and buying and selling pools, upon the result of a trial or contest of skill, speed or endurance of man, beast, bird or machine, or upon the result of a game, competition, political nomination, appointment or election.

(b) The act of registering such bets and buying and selling such pools and being concerned in buying and selling the same.

(c) The knowing, keeping, exhibiting, using or employing a device or devices or apparatus for registering such bets or for buying or selling the same and the knowing permitting of the aforementioned violations.

(d) The acts or act of conspiring to commit the unlawful acts described in (a), (b), and (c) of this paragraph, and:

(e) That the nature of said wire communications sought to be intercepted and overheard have been and will continue to be communications indicating violations of other closely related Sections of Mass. General Laws, Chapter 271, besides Section 17; such as Section 17A, which provides a penalty for using a telephone or permitting a telephone subscribed for to be used for the purpose of accepting wagers or bets and for other Gaming violations.

(9) That normal investigative procedures have been tried; such as surveillance and the questioning of informers have been tried and have failed and, due to the organized nature of said conspiracy, the evasive tactics used by its members, the secretiveness of its members, the number of participants involved and the care with which each member takes to conceal his actions, normal investigative procedures appear reasonably unlikely to succeed. The apparatus used to register bets, usually notations on slips of paper, are easily and quickly burned, disposed of, or concealed so that Officers searching pursuant to Search Warrants will, in all probability, not be able to find or seize them. Moreover, the principal means of committing the said designated offenses and conspiracy to commit them are spoken words over the telephone which may, of course, be intercepted and overheard only in compliance with Section 99 of Mass. General Laws, Chapter 272.

(10) The wire communications sought are material to the investigation and intended prosecution of MARY, MILLY, JAMES VITELLO, RALPH "FRED" VITELLO, TANZI, JOHN DOE, FRANK VITELLO, the operators of the Wire Service and divers other persons, and that such communications are not legally privileged.

(11) That the interception is required to be maintained for a period of 15 calendar days, commencing on the date of installation of the intercepting device, and that the

hours of each day during which wire communications may be reasonably expected to occur are those between the hours of 11:00 a.m. to 7:30 p.m.

(12) That the nature of this investigation is such that the authorization for the interception should not automatically terminate when the described oral or wire communications are first obtained; that the Affidavit attached hereto specifically states facts establishing probable cause to believe that additional wire communications will be obtained; that those facts and the inferences that may be drawn from them indicate that the said illegal Gaming and the conspiracy to commit the same are continuing and extensive, well-organized and comprises the primary means of livelihood of many of the persons described in said Affidavit.

(13) That no other prior application has been submitted or warrant previously obtained for interception of oral or wire communications for said telephones numbered 323-1012 or 327-5892 at 28 Meyer Street.

(14) That there is good cause for requiring the postponement of service pursuant to Paragraph 1, Subparagraph 2 of Section 99 of Mass. General Laws, Chapter 272 in that the following exigent circumstances and important special facts exist: "MARY" and "MILLY" whose wire communications are sought to be intercepted, are employees, associates, possible relatives, companions and co-conspirators of divers other persons, some as described in the Affidavit and others now unknown to this Applicant, whose acts and communications are or may soon be under investigation and who may become the subjects of later applications pursuant to said Section 99, Mass. General Laws, Chapter 272. If either or both MARY or MILLY are given notice within thirty days of the expiration of the interceptions, there is great danger that other investigations will be jeopardized and

Law Enforcement will be unable to pierce the layers of insulation and break down the wall of secrecy with which organized crime has protected itself. It is submitted by the Applicant that the apprehension and successful prosecution of the low level workers of Organized Crime has not been and is not successful in eliminating Organized Crime. Only the apprehension and successful prosecution of the organizers and controllers of the organization, and of necessary illegal support of such as the Wire Service will serve to eliminate Organized Crime. Secrecy is essential to the identification and apprehension of these persons.

WHEREFORE, the Commonwealth asks that this Court order and direct that an attested copy of any warrant issuing upon this application be served upon said MARY or MILLY, or any other persons as required by said Section 99 only when this and related investigations have been completed but in no event later than three (3) years from the time of expiration of the warrant or the last renewal thereof, whichever shall occur first.

(15) The neighborhood in the vicinity of 28 Meyers Street is residential, consisting mostly of persons who have been there for some time. It is extremely unlikely, probably impossible, to find a location at which to install an interception in the vicinity of 28 Meyers Street itself. Given the nature of the neighborhood and the caution displayed by the persons under surveillance, our activity would be spotted. A location has been secured, however, in the same exchange so that it will not be necessary to make a secret entry upon a private place and premises in order to install an intercepting device or recording equipment and the point from which to install the intercepts on said two telephones, 322-1012 and 327-5892 by use of leased lines will be on the premises or property of the New England Telephone Company.

(16) For the reasons given above and upon the facts sworn to, it is hereby respectfully requested that this Court issue a Wire Tap Warrant authorizing Officer JOHN C. O'MALLEY to intercept the wire communications of MARY and MILLY running to and from telephones numbered 323-1012 and 327-5892 at 28 Meyers Street, Roslindale, the date of said interception by Warrant to commence upon installation of the intercepting device in conformance to Section 99, I.A. 2 of Chapter 272.

Respectfully Submitted,
GARRETT H. BYRNE,
DISTRICT ATTORNEY,

By his specially designated Assistant District Attorney,
ROBERT SNIDER,
Assistant District Attorney.

Then appeared before me the said ROBERT SNIDER and being duly sworn, made oath that the above statements are true.

Dated this 10th day of May, 1972 at Boston, Massachusetts.

REUBEN L. LURIE.

SUFFOLK, ss: SUPERIOR COURT

AFFIDAVIT.

I, JOHN C. O'MALLEY, Detective, Boston Police Department assigned to the Suffolk County District Attorney's Office, being duly sworn, state:

1. That on April 24, 1972, I appeared before REUBEN L. LURIE, Judge of the Massachusetts Superior Court, Suffolk County and submitted and swore to an affidavit, a copy of which is attached hereto and marked "C". I respectfully request that said Affidavit marked "C" be, by reference, made a part hereof for all purposes including my oath made on this date.

2. Pursuant to the Wiretap Warrant, dated April 24, 1972, marked "D", on April 25, 1972 an intercepting device was installed and commenced interceptions and recording of communications at 11:00 a.m. on the telephone numbered 327-5527, located in Suite 2 at 102 Cass Street, West Roxbury. In excess of 300 communications were intercepted from 11:00 a.m. to 7:30 p.m. on the following dates: April 25, 26, 27, 28, and 29; May 1, 2, and 3, 1972. The great majority of said intercepted communications concern violations of Mass. General Laws, Chapter 271, Section 17 and the conspiracy to violate the same.

3. As a result of said interceptions and recordings, conducted by myself and other Detectives of the Suffolk County District Attorney's Staff, it was established that FRED VITELLO spoke over his telephone (327-5527) to, among others, a woman, who is called and identifies herself as "MILLY", seven or eight times each day on either of two telephones; 323-1012 or 327-5892. Both telephones are listed in the records of the New England Telephone Company to "WILLIAM P. WEST, 28 Meyer Street, Roslin-

dale, Mass." and are located at 28 Meyer Street. The January 1971 Voter Listing Book lists Anna Stark (formerly of 43 Jewett Street) and PAUL F. and JEAN VITELLO as the occupants of 28 Meyer Street. The 1972 Cole's Dictionary lists the occupants of 28 Meyer Street as ANNA STARK and WILLIAM P. WEST, Contractor. On April 25, 1972, FRED VITELLO called MILLY at 323-1012 four times and received one call from her and in all of said calls, Number Play and Horse Play was discussed and taken and the results of Horse Play was asked for by FRED and given by MILLY. I can hear, during MILLY's calls, another female called "MARY" answering another telephone at MILLY's location. In several calls FRED and MILLY discuss "FRANK" and "The Boss" and "My Brother". It is my opinion, based upon my surveillances and these conversations, that "FRANK" is FRANK VITELLO. In one call on the 25th., FRED told MILLY to have "HENRY" pick up any messages for him. It is my opinion, based upon my surveillances and these conversations that "HENRY" is HENRY F. TANZI.

On April 26, 1972, at 1:30 p.m., while MILLY was conversing with FRED, I dialed 323-1012 and received a busy signal. Over our intercept I could hear MARY talking on another phone so I immediately dialed 327-5892 and received a busy signal. At about 4:40 p.m. on the same date, I repeated the same procedure and again both lines were busy. Again on the same date at 5:08 p.m. FRED dialed 323-1012 and before the phone rang he hung up and immediately dialed 327-5892. The female "MARY" answered and discussed Horses with FREDDIE. In the background I could hear MILLY talking on the other phone. MILLY's conversations with FRED dealt almost exclusively with Gaming talk.

4. Officer THOMAS O'BRIEN, the same brother Officer mentioned in the Affidavit marked "C", told me on May 2,

1972, that on May 1, 1972, at about 6:15 p.m. he was watching 28 Meyer Street, and he saw two females enter a 1971 Blue Mercury Sedan, Mass. Reg. 86117, listed in the Registry to LEON CARRESI, 28 Pinedale Road, Roslindale, and operated by a male we have seen in the Dwarf Restaurant. We have observed this same car parked almost daily in front of the Dwarf Restaurant, *4013A* Washington Street, Roslindale and we have observed the same man who was operating the car as the Manager of the Dwarf Restaurant. Our observations disclosed that when TANZI made his pick-up at the Dwarf, the Restaurant was shortly thereafter closed and the same operator got in the car and left. PAUL MATTHEWS, Mass. State Police, told me that while they were following FRANK VITELLO, he stopped at the Dwarf every day. I have observed FRANK stop at the Dwarf on more than five occasions and I noticed that his visits coincided with those of TANZI.

5. I spoke with Special Agent DENNIS CONDON, F.B.I. Organized Crime Section and liason to State and Local Law Enforcement Agencies within the last two days and he told me that a garage at 6 Organ Park, Roslindale had been raided for Gaming Violations in 1963. Although telephones FA3-2237, 2238 and 2239 were listed there to a fictitious company, "T & T Construction Company", only one phone was found. (The owner of the garage, JOHN B. TANZI, denied knowledge of the use of the garage as he said he rented it out). The Officers searched the garage and found phone wires running underground from the garage to the premises at 28 Meyer Street, where four (4) phones were found: FA5-0454, FA3-7836, FA3-2913, and FA3-1012, one of the phones MILLY is now using. The occupant of 28 Meyer Street at that time was the father of FRANK VITELLO.

6. MILLY's conversations with FRED, which I have heard, generally consist of MILLY giving FRED "heavy"

Number Play (Example: call #236 on April 29, 1972; MILLY gave FRED 0230 - 1 and 1; 118 - $4.00; 1788 $1 and 3; 1200 - $1 and 3, 1287 - $1 and 3, 1651 - $1 and 2; 1656 - $1 and 1; 210 - $3.50; 2169 - $8.50) and MILLY's giving FRED the number for the day and the results of the Horse Races at various tracks, such as Suffolk Downs, Narragansett, "Gardens", Hialeah, Pimlico and Big A. The fact that MILLY gives the Race results to FRED indicates to me, to Detective JOHN F. DOYLE, and to the other Officers in the District Attorney's Office, that MILLY receives such results from a "wire service", that is an organization which provides to illegal Bookmakers, wagering information and fast and sure results of Horse Races without which illegal Horse Play could not be taken. On May 2, 1972 during one of MILLY's conversations with FRED, she states that the service has moved out but she has the new number. It is my opinion and the opinion of the other Officers, that the identification and apprehension of those involved in the Wire Service, is necessary to the discovery and stopping of the continued violations of Mass. General Laws, Chapter 271, Section 17, and the elimination of those involved in the conspiracy to violate the same whether they be street agents or those who organized, and control such conspiracy, and reap the profits thereof. The "Wire Service" usually services many individual Bookmaking operations and therefore, when it is shut down by Law Enforcement, all the Bookmakers who relied upon it are also forced to shut down. Illegal Bookmakers cannot rely upon legal sources of information, such as Race Track results printed in newspapers because the information is too slow. In order to run their operations, they need to learn the results of Horse Races very shortly after the running of each race so that winners may be paid off and so that their customers may know how to bet a later race. In addition, the wire service

may be used by the Bookmakers to "lay-off" bets; i.e., to have larger Bookies take part or all of some bets so that the risk of paying off a big winner is spread around several persons, a necessary service to a Bookmaker. In times past, I have been told by other Law Enforcement Officers involved in the investigation of Gaming, when the wire service was closed down, all the Bookmakers serviced by that wire service closed down.

7. The neighborhood in the vicinity of 28 Meyers Street is residential, consisting mostly of persons who have been there for some time. It is extremely unlikely, probably impossible, to find a location at which to install an interception in the vicinity of 28 Meyers Street itself. Given the caution displayed by the persons under surveillance, our activity would be spotted. A location has been secured, however, in the same exchange and so that it will not be necessary to make a secret entry upon a private place and premises in order to install an intercepting device or recording equipment and the point from which to install the intercepts on said two telephones, 323-1012 and 327-5892 by use of leased lines, will be on the premises of the New England Telephone Company.

8. Physical surveillance, the use of informants, or other types of normal investigation would be fruitless in combatting this conspiracy since "MILLY" and "MARY" seem to do nearly all of their dealing up and down the hierarchy of the conspiracy via telephone, and describe many persons with code names, such as "A7".

Respectfully Submitted,
JOHN C. O'MALLEY, Detective,
Boston Police Department.

The appeared before me the said JOHN C. O'MALLEY, and being duly sworn, made oath that the above statements are true,

Dated this 10th day of May 1972 at Boston, Massachusetts.

REUBEN LURIE,
Suffolk Superior Court.

Appendix C.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS: SUPERIOR COURT.

SUFFOLK TO WIT:

TO THE DISTRICT ATTORNEY FOR THE COUNTY OF SUFFOLK, HIS SPECIALLY DESIGNATED ASSISTANT DISTRICT ATTORNEY, AND HIS DESIGNATED INVESTIGATIVE AND LAW ENFORCEMENT OFFICERS:

GREETING:

Whereas, application in writing under oath, supported by Affidavits, has been made before me this day, the subscriber hereto, REUBEN L. LURIE, a Justice of the Superior Court of the Commonwealth, for an order authorizing and directing the interception of wire communications pursuant to Mass. General Laws, Chapter 272, Section 99; complaining that two females, "MILLY" and "MARY", a more complete description being unknown to the Commonwealth at this time, who are now working at 28 Meyer Street, Roslindale section of the City of Boston and using two telephones located therein, 323-1012 and 327-5892, in order to violate Mass. General Laws, Chapter 271, Section 17 and to conspire to violate the same; have conducted, are conducting, and will continue to conduct from said 28 Meyer Street, criminal activities connected with a continuing conspiracy by means of a highly organized and disciplined organization to engage in supplying illegal goods and services, namely; violation of Section 17, Mass. General Laws, Chapter 271, contrary to the laws of this Common-

wealth, and that they communicate by means of the telephones between and among themselves in furtherance of such conspiracy, that these communications are made by MARY and MILLY to FRED VITELLO, to a Wire Service and to diverse individuals named in the attached Affidavits and amongst and between any or all of them, and any other person or persons unknown concerning unlawful Gaming by means of the telephone instruments located on the above described premises at 28 Meyer Street, and that said instruments 323-1012 and 327-5892 are of this date both listed to WILLIAM P. WEST as subscriber at said address according to the records of the New England Telephone and Telegraph Company, and used by said MILLY and MARY and other diverse individuals and persons unknown at this time who send and receive wire communications concerning unlawful Gaming and violations of Section 17 of Mass. General Laws, Chapter 271, and conspire to violate the same.

Whereas the application for authority to intercept the wire communications as aforesaid complies with the provisions, purposes and procedures of Section 99, Chapter 272, Mass. General Laws, as Amended, and finding probable cause supportive of these presents, WE COMMAND you and each of you forthwith, with necessary and proper systems to INTERCEPT any communications transmitted over, from, and to the telephone instrument of WILLIAM P. WEST, located at 28 Meyers Street, Roslindale section of Boston, Massachusetts, and to tap and make connections with any and all wires leading to the telephone instruments as of this date numbered 323-1012 and 327-5892, with a purpose to obtain evidence of the unlawful activities of MARY, MILLY, FRED VITELLO, FRANK VITELLO and other persons as described in the Affidavit submitted with said application and a person or persons unknown at this time concerning Unlawful Gaming and violations of Section 17, Mass. General Laws,

Chapter 271, and to aid in the apprehension and discovery of the persons herein named and their unknown confederates in crime, and that such interception procedure shall not automatically terminate when the type of communication described in the Application and Affidavit has been first obtained, but shall continue until communications are intercepted which reveal the details of said violations or the said conspiracy and the identity of participants therein and the extent of the violations and the location or locations involved therein because the Application alleges, and it is found as a fact that good cause, special important facts, and exigent circumstances exist to require the postponement of service of a copy of the within warrant until after the expiration of this and related investigations, but not later than three (3) years thereafter, and that the evidence obtained by authority of these presents be dealt with according to law, and return this warrant with your doings thereon.

You are therefore authorized and directed with all necessary assistants to install leased lines for the interception of said wire communications. The leased lines used in the execution of this warrant is to consist of a private telephone line installed at a place designated by ROBERT SNIDER, specially designated Assistant District Attorney. The leased line is to be supplied by the New England Telephone & Telegraph Co. pursuant to this order and warrant.

WITNESS, my hand and seal on this date of issuance the 10th day of May, 1972.

REUBEN L. LURIE,
Suffolk Superior Court.

In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1255.

FRANCIS A. VITELLO,
PETITIONER,

v.

CHARLES GAUGHAN,
SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, BRIDGEWATER,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner's Reply Memorandum.

FRANCIS J. DIMENTO,
DIMENTO & SULLIVAN,
100 State Street,
Boston, Massachusetts 02109.
Attorneys for Petitioner.

BATEMAN & SLADE, INC. BOSTON, MA.

Table of Authorities Cited

Cases

Constitutional and Statutory Provisions

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1255

FRANCIS A. VITTELO,
Petitioner,

v.

CHARLES GAUGHAN,
Superintendent, Massachusetts Correctional Institution, Bridgewater,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONER'S REPLY MEMORANDUM

I.

Respondent's Opposition confirms that this case squarely presents important questions never before considered by the Court regarding whether Stone v. Powell, 428 U.S. 465 (1976), and Davis v. United States, 417 U.S. 333 (1974) foreclose enforcement of the Title III suppression remedy in federal habeas corpus proceedings

under 28 U.S.C. §2254. Beyond this, respondent's defense of the decision below rests so completely on fundamental misconceptions of Stone and Davis, that it only serves to underscore the need for review by this Court.

A. Respondent concedes that the suppression remedy petitioner asserts under Title III was created by Congress, while the suppression remedy involved in Stone was judicially created. But respondent contends that this is irrelevant since Stone restricted the substantive scope not of the remedy, but of habeas corpus jurisdiction. Stone provides no support whatsoever for this theory, and, indeed, respondent conspicuously fails to claim any from the Court's opinion.[1]

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[1] If the substantive scope of habeas jurisdiction had been the issue in Stone, then the Court would necessarily have been required to confront, among other venerable precedents, Brown v. Allen, 344 U.S. 443. But nothing in Stone suggests that Brown has been overruled. Had Stone overruled Brown, it would represent a sudden and inexplicable reversal of many recent habeas decisions enforcing the Fourth Amendment, see e.g., Lefkowitz v. Newsome, 420

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U.S. 283, in which the majority never indicated the slightest doubt of the Court's antecedent authority stemming from Brown.

Respondent contends that a substantive cut-back in habeas jurisdiction would not conflict with Brown, because that decision announced no substantive doctrine. In respondent's view, Brown merely recognizes the Court's plenary "power to alter the writ," according to its own policy calculations. (Res. Op. p. 6) This reading of Brown is completely unfounded, and propogates a dangerous and baseless conception of judicial autocracy and Congressional abdication. The Court never claimed such power, and, indeed, the Brown Court was quite explicit in recognizing that its ruling was an expression of congressional will, not its own. "Jursidiction over applications for federal habeas corpus," the Court stated, "is controlled by statute." 344 U.S. at 459. While Brown expanded the substantive scope of habeas corpus, it did so strictly "to give fair effect to the habeas corpus jurisdiction as enacted by Congress." Id., at 499 (opinion of Justice Frankfurter). Again, resorting to the statutes establishing habeas jurisdiction and the Congress' intent behind them, Justice Frankfurter concluded that foreclosing federal collateral review on the basis of a prior state determination would give the state court "the final say which the Congress, by the Act of 1867, provided it should not have." Id., at 500.

Stone holds that defendants have no Fourth Amendment right to have illegally seized evidence suppressed.[2] As such, Stone reiterates the Court's previously announced conclusion that the suppression rule applied in Mapp v. Ohio, 367 U.S. 643 (1961) is a judicially created "remedial device," which can be "restricted [by the Court] to those areas where its remedial objectives are thought most efficaciously served." United States v. Peltier, 422 U.S. 531, 620 (1975); see also United States v. Janis, 428 U.S. 433, 446-447 (1976). The judiciary has no such policy-making power over the Title III suppression remedy.

Respondent recognizes that the Title III suppression rule is a "codification" of the judicial suppression rule applied in Berger v. New York, 388 U.S. 41 (1967). But contrary to respondent's unsupported argument, the legislative history and language make it clear that the suppression

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[2] It appears that concepts of due process might require suppression, even though the Fourth Amendment does not, where the seizure is undertaken in a bad faith or particulary offensive manner. See United v. Janis, 428 U.S. 433, 444 (1976).

remedy enacted by Congress was intended not only to have the same scope as the judicial rule had in the then "present [1967] search and seizure law" (see Pet. p. 21), but also to have application in a far greater range of areas than the judicial rule. See Pet. p. 22-23; also compare 18 U.S.C. §2515 with United States v. Janis, supra. Overwhelming evidence demonstrates that Congress never intended to accept the significant degree of illegal and excessive wiretapping that would be fostered by precluding application of the Title III suppression rule in federal habeas corpus proceedings.[3]

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[3] Besides being rather presumptuous, respondent's attempt to substitute his policy judgment for that of Congress is basically flawed. Wiretap violations of the Fourth Amendment involve materially distinct considerations than those raised by the illegal seizure of physical evidence.

First, Title III provides a detailed, explicit code of constitutional and statutory requirements. By contrast, Fourth Amendment rules governing seizure of physical evidence are embodied in case law that, as Justice Powell found, "is difficult for courts to apply, let alone for the policeman on the beat to understand." Schneckloth v. Bustamonte, 412 U.S. 218, 269 (1972)(Concurring opinion). While relying heavily

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on the Schneckloth concurrence, respondent completely ignores Justice Powell's conclusion that because those "nonfrivolous Fourth Amendment claims that survive for collateral review are most likely to be in this grey, twilight area," they present the cases "where the deterrence function of the exclusionary rule is least efficacious..." 412 U.S. at 269-270. The reverse is true in the wiretap area. After enactment of Title III, the requirements are clear. Violation, therefore, can be taken as proof of police bad faith or reckless disregard of the law. That is precisely the case here, where, the prosecutor showed gross disrespect for the warrant requirement by not even reading the wiretap order to determine the operating time limits. Clearly, such indifference to Title III requirements will be deterred by strict and maximum enforcement of the suppression remedy. Because the Title III code is so clear, the police will have little difficulty in understanding and complying with its requirements. Strict enforcement can thus reduce the judicial and social costs noted in Schneckloth and Stone, by sharply reducing the number of violations the courts must hear and redress, and the number of guilty persons the courts must free.

Second, maximum deterrent force is required for wiretapping, by contrast to seizure of physical evidence, because wiretapping effects an irrevocable seizure of the conversations, see United States v. Focarile, 340 F.Supp. 1033, 1047 (D.Md. 1972), aff'd on other grds., 416 U.S. 505, and because the inherent secrecy of wiretap surveillance can be exploited to secure,

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retain and use information surrepticiously and unchecked by judicial authority.

Third, to be sure, federal habeas power should be exercised where a claim of innocence is made, but it does not follow that it should not be exercised unless the defendant can make such a claim. Habeas enforcement of Title III ensures the protection of the innocent, not necessarily defendants, but the greater population, whose innocent privacy would surely be jeopardized in the absence of this enforcement. Other constitutional rights enforced in habeas proceedings, like those relative to grand jury selection and burden of proof, serve a similar function. It should also be noted that the first and most basic use of habeas power was to review the court's jurisdiction to try the case, see Schneckloth v. Bustamonte, supra, at 255, a question not inherently or always likely to aid in protecting the innocent or finding the truth. See e.g., Matter of Moran, 203 U.S. 96 (1906).

B. Respondent makes the crucial concession that Davis has no application to Fourth Amendment wiretap claims. (Res.Op. p. 7) And it appears respondent also acknowledges the constitutional nature of petitioner's charge concerning the state court's failure to determine and specify in its order, operating time limits. Although respondent does not say so directly, the implication from his concessions is that Davis adds no obstacle beyond Stone to the exercise of federal habeas jurisdiction over petitioner's claim of constitutional right.

But no matter how petitioner's claim is characterized, Davis has no application in this case. Davis and Hill v. United States, 368 U.S. 424 (1962) regulate reaccess to federal court for federal prisoners who have or could have exercised a right to litigate their claims at trial and direct appeal. By contrast, petitioner invokes federal jursidiction for the first time to review his claims of federal right. Since Congress' principle objective in establishing habeas jurisdiction was to subject all claims of federal right to federal scrutiny, that objective is sub-

stantially satisfied when a prisoner has had one full opportunity as of right to federal review. At that point considerations of efficiency, finality and judicial economy appropriately operate to close the gate to all cases except those presenting special circumstances. See 28 U.S.C. §2244(a) and (b). But Congress' objective cannot be served in this case, where §2254 jurisdiction is invoked for the first time, except by exercise of that jurisdiction.[4]

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[4] Thus, while the substantive "grounds for relief under §2255 are equivalent to those encompassed by §2254," it does not follow, as respondent contends (Res. Op. p. 8), that the finality rule in both proceedings is identical. Respondent recognizes this and attempts to blur the distinction between substantive and management questions by quoting out of context the Davis phrase: "in operative effect." In context, that phrase refers solely to the substantive equivalence of §2254 and §2255 jurisdiction. See Davis v. United States, supra at 344-345.

Application of Davis conflicts not only with Congress' purpose in establishing §2254 habeas jurisdiction, but also with Congress' express statutory mandate for the exercise of that jurisdiction. In 28 U.S.C. §2244(c), Congress has declared that state prisoners are entitled to one full opportunity to federal habeas review of any claim of "Federal right," without limitation as to "prejudice" or otherwise. The sole exception to this provision for mandatory review exists in a case where this Court has, on certiorari or appeal from the state judgment of conviction, adjudicated the federal claim on the merits.

II.

Respondent's answer to petitioner's showing of prejudice is to ignore it. Respondent misleads when he suggests that the only problem with the wiretap order was "the inadvertent omission of a termination date," and that this error was cured because "the surveillance was concluded within 12 days (thus satisfying the purpose underlying the enactment of §2518(4)(e))." (Res.Op. pp. 2, 12) True, the order contained no termination date, but the chief

cause for its invalidity is that the state court failed to determine and to specify in the order the operating time for the tap.[5]

The termination date represents only the number of days the tap may remain installed, not the number of days it may actually operate. Compare 18 U.S.C. §2518 (4)(e) with §2518(5). The latter is a matter governed by the constitutional standard of "necessity." Again, it is true that the operating time requested

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5 Respondent seeks to blunt the issue by claiming the question was not raised below. On the contrary, petitioner registered an unqualified objection to the absence of all required time limits in the wiretap order. Petitioner did not contest the factual basis of the state court's view of how much operating time was "necessary," because, as no such determination was made or specified, that challenge would be premature.

was 15 days, but that represents the maximum amount of time possible, and under the circumstances of this case it cannot be presumed that the prosecutor's request was necessarily granted. It is quite likely that the state court, assuming it made any determination regarding operating time, could have concluded that all that was "necessary" was three or four days operating time, given that this was a second wiretap against the same person, given that the tap would be installed in a private home, and given that the prosecution may always request an extension of the order. See 18 U.S.C. §2518(5). The evidence used to convict petitioner may have been derived from communications secured on the 11th or 12th day of operation, or otherwise at a point when the tap was operating in excess of the time the court might have specified in the order. How can respondent claim the prosecutor complied with the operating time limits, when no one knows what those limits were? Moreover, respondent's insistence that the application filled the order's time limit blanks is fallacious; since when is a prosecutor's request automatically converted

into a judge's order?[6]

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[6] Respondent's citation of cases where wiretap applications have been read as elucidating a provision of the wiretap order (Res.Op. p. 3 n. 3) only accentuate the substantiality of the wiretap illegalities petitioner asserts.

In United States v. Tortortello, 480 F.2d 764 (2nd Cir. 1973), the issuing court failed to describe the type of communication sought to be intercepted, and the particular offense to which it relates, but the order was sustained because it specifically referred to and incorporated the paragraphs of the application detailing the particulars.

United States v. Manfredi, 488 F.2d 588 (2nd Cir. 1973) held that the direction to minimize interceptions, required to be placed in all orders, was "talismanic minimization language," the omission of which did not void the order. Id., at 598. The court noted that the application "promised" minimization. Of course, in this case the prosecution cannot promise itself into operating time the court has not granted. See also United States v. Cirillo, 499 F.2d 872 (2nd Cir. 1974). Finally, in United States v. Poeta, 455 F.2d 117 (2nd Cir. 1972), the court found that exclusive of the wiretap fruits, the evidence against the defendant was "over whelming," and that the order itself contained language indicating that the provision involved was mistakenly crossed out.

Failure to determine and specify the operating time limits is a violation of constitutional magnitude and violates a requirement that clearly plays a crucial and substantive role in the Title III scheme. Moreover, absence of operating time limits rendres the order "insufficient on its face" under 18 U.S.C. §2518(10)(a)(ii). True to the constitutional model, the Act directs suppression of all evidence seized on the authority of such a facially defective order regardless of whether the prosecution was well intending or claims "substantial compliance."[7]

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[7] United States v. Chavez, 416 U.S. 562 concerned subpart (i) of §2518(10)(a), and is distinguishable from this case where the challenge is brought under subpart (ii). In Chavez, the Court found that the phrase "unlawfully intercepted" did not encompass any and all violations of the Act's myriad requirements. Instead, it focussed only on those requirements playing a "substantive role" in the legislative scheme. See United States v. Donovan, 97 S.Ct. 658. Subpart (ii) contains no such restriction. It clearly condemns the evidence obtained under the authority of an order that fails to contain the specified particularizations set forth in §2518(4) and (5). Even if the scope of subpart (ii) did not encompass every particularization required, it certainly would include the key and constitutionally required specification of operating time.

Conclusion

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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